JD–09–20
Akron, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KENNY/OBAYASHI V, A JOINT VENTURE
BETWEEN KENNY CONSTRUCTION COMPANY
AND OBAYASHI USA, LLC

and Case 08–CA–226350

LABORERS' LOCAL UNION NO. 894 A/W LABORERS
INTERNATIONAL UNION OF NORTH AMERICA

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Robert T. Dunlevey, Esq.
for the Respondent.
Basil W. Mangano, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Cleveland, Ohio, on August 6 - 9, 2019 and October 7, 9, and 10, 2019. The Laborers' Local Union No. 894 a/w Laborers International Union of North America (the Charging Party or Union) filed a charge on August 27, 2018,[1] and the General Counsel issued a complaint and notice of hearing in this matter on April 25, 2019.[2]

The complaint alleges that the Respondent discriminated against employee Ivan Thompson by laying him off and/or terminating him for his assistance to the Union and for engaging in protected concerted activities, in violation of Section 8(a)(3) and (1) of the Act.[3] In its answer to the complaint, the Respondent denied the allegations.

[1] An amended charge was filed by the Union on October 15, 2018, a second amended charge was filed on November 5, 2018, a third amended charge was filed on November 19, 2018, and a fourth amended charge was filed on July 17, 2019.

[2] The General Counsel also issued an amendment to complaint on July 23, 2019. All dates are 2018, unless otherwise indicated.

[3] The General Counsel amended the complaint at trial to allege that Thompson was "laid off and/or terminated" instead of simply being "terminated." (Tr. 891–892.)

On the entire record,[4] including my observation of the demeanor of the witnesses,[5] and after considering the briefs filed by the General Counsel, the Union,[6] and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Kenny Construction Company is an Illinois corporation and a wholly-owned subsidiary of Granite Construction, Inc. Respondent Obayashi Corporation is a Japanese corporation. The parties stipulate that Kenny/Obayashi V, a Joint Venture, is a joint venture between Kenny Construction Company, a wholly-owned subsidiary of Granite Construction, Inc., and Obayashi USA, LLC, a wholly-owned subsidiary of Obayashi Corporation. (Tr. 16–17; Jt. Exh. 1.)[7] The Respondents, in their joint venture, with an office and place of business in Akron, Ohio, have been engaged in the business of constructing the Ohio Canal Interceptor Tunnel in Akron, Ohio. The Respondents admit, and I so find, that annually in conducting their business operations described above, they purchased and received at the Akron, Ohio facility goods valued in excess of $50,000 from points outside the State of Ohio.

It is also admitted, and I so find, that Respondents, in their joint venture, have been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

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[4] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "Jt. Exh." for Joint Exhibit; "CP Exh." for Charging Party/Union Exhibit; "GC Br." for the General Counsel's brief; "R. Br." for Respondent's brief; and "U. Br." for the Union's brief.

By Order dated December 2, 2019, the Respondent's Motion to Reopen the Record for the limited purpose of including evidence of telephone records dated August 24 through September 15, 2018 from Respondent Superintendent Michael Quinn was granted. Those records, which were attached to the Respondent's motion as Exhibit A, were ordered admitted into evidence and marked as Respondent Exhibit 15.

[5] In making my findings regarding the credible evidence, including the credibility of the witnesses, I considered the testimonial demeanor of such witnesses, the content of the testimony, and the inherent probabilities based on the record as a whole. In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

[6] The Union's posthearing brief consisted only of its statement that it ". . . concurs with and incorporates by reference Counsel for the General Counsel's Brief to the Administrative Law Judge . . . dated December 13, 2019." (U. Br.)

[7] Kenny/Obayashi V, a Joint Venture, will be collectively referred to as "Respondent."

II. Alleged Unfair Labor Practices

A. The Facts

1. Background

Many of the facts in this case are undisputed. The Respondents, in November 2015, pursuant to their joint venture agreement executed on December 5, 2014, commenced construction on the Ohio Canal Interceptor Tunnel (referred to as the OCIT project) in Akron, Ohio. (Jt. Exh. 2; Tr. 145.) The purpose of the OCIT project was to reduce overflow of sewage in rivers and waterways, and its main feature consisted of a mile-long finished tunnel that was 27 feet in diameter. (Tr. 42.) The project was designed to catch all sewers throughout the City of Akron, and divert them to the main portal site. The Respondent maintained three primary jobsites on this tunnel work project, including the jobsite at issue located at 144 Cuyahoga St., in Akron, known as the Cuyahoga site or OCIT-1 site. (Tr. 43–44.) The Respondent's project included placing deep foundation shafts for the tunnel at the three main sites. The Respondent's main office for the Akron, Ohio project was located in the main trailer at the OCIT-1 site. (Tr. 43.)

Respondent Project Manager David Chastka oversaw all aspects of the job and was responsible for the supervision of all field staff, including: General Superintendent Mike Quinn; Night Superintendent Terry Quinn; Project Engineer John Criss;[8] Safety Manager Brad Swinehart; Day-shift Tunnel Foreman Jack Harris; Night-shift Tunnel Foreman Travis Heatley; and Yard Crew Day-Shift Foreman Mark Seese. (Tr. 46–47; Jt. Exh. 4) Mike Quinn and his son Terry Quinn were brought to the project from earlier tunnel projects and were members of the Laborers' Local out of Chicago, Illinois. Jack Harris likewise came from a previous project and was a member of a Laborers' Local out of Columbus, Ohio. (Tr. 47–48.) Project Manager David Chastka was responsible for terminating, laying off, and hiring all employees on the Akron OCIT Project. (Tr. 99.) Chastka testified that "termination" on the project was interpreted as the end of employment, whether it was for layoff or cause. (Tr. 100.)

The employees hired to work on the Akron OCIT project were mostly members of the Local Operators Union and the Laborers' Local 894 Union, which represented the laborers employed in the Akron, Ohio area. (Tr. 181–182; Jt. Exh. 2; GC Exh. 1(i).) The Respondent and Local 894 were signatories to a Project Labor Agreement (PLA) between the City of Akron, the Tri-County Building and Construction Trades Council, and various affiliated unions. (Jt. Exh. 2) The PLA was executed on July 1, 2014, for purposes of facilitating construction of the Ohio Canal Interceptor Tunnel and to address the terms and conditions of employment for employees on that project. (GC Exh. 14; Jt. Exh. 2.) Section 6 of the PLA contained a nondiscrimination provision which prohibited discrimination based on age, race, creed, color, sex, veteran status or national origin as it related to hiring, training, promotion, transfer or termination of employees. (GC Exh. 14) The PLA also provided that covered employees utilize the PLA's grievance procedure to resolve specified claims of employment discrimination. (GC Exh. 14.)

[8] David Chastka testified that John Criss left the project in May or June 2018. (Tr. 71–72)

The excavation of the tunnel was performed by use of a tunnel boring machine (TBM), a 55 foot-long piece of equipment with 300 feet of attached trailing gear which included ventilation, power, and hydraulic equipment. (Tr. 52.) The TBM typically excavates 5 feet and then installs a pre-cast concrete ring (made from concrete segments), thus slowly moving forward until it breaks through at its destination. (Tr. 53.) When the project began in November 2015, the Respondent initially relied on its own crew of two to three experienced workers it had transferred from another project in Columbus, Ohio, and its main subcontractor for its surface and site setup work. (Tr. 177.) Once the TBM arrived, the project intensified with all employees working on day shift to assemble the machine, which was an involved and arduous process. (Tr. 178–181.) Chastka testified that the work force was at its peak from around June 2016 to February 2017, when the smaller shafts and tunnels were being put in to support the excavation from the top. (Tr. 183–184) The TBM was launched sometime after February 2017 and the mining work on the main tunnel was conducted throughout that time until the end of August 2018, when the TBM broke through the retrieval shaft. (Tr. 183–185.)

The Respondent's employees were not separated into different crews or shifts until the shaft work was completed and mining began. (Tr. 181.) After hiring its superintendent and foreman to begin the shaft work, all of the Respondent's hires on the project came from local unions, which at the time were mostly "laborers" and "operating engineers." (Tr. 181–182.) The work force consisted of a tunnel crew of about 15 employees working on the TBM as it operated. (Tr. 53.) The Respondent also employed a separate crew on the surface which was referred to as the "Yard Crew," "Bull-Gang Crew," or the "Surface Crew," and which consisted of approximately 10 employees who would bring in supplies as needed to the crew for the tunnel excavation. Steel storage containers used to move equipment and supplies from job to job, referred to as "Conex Boxes," were used at the site. (Tr. 61.) The Yard Crew was responsible for maintaining the 15 to 20 Conex Boxes and they brought needed tools and items from the Conex Boxes to the Tunnel Crew. (Tr. 62.) The Yard Crew also maintained the yard by cleaning it up and cutting trees as required. When the TBM was assembled and running, the Yard Crew helped maintain the shop on the surface that was utilized to make repairs to the operation. (Tr. 60.) Chastka testified that only a handful of employees brought in on the project had experience on the TBM, and that the people who were hired in the Tunnel who did not have experience were from Laborers' Local 894. (Tr. 56.) Chastka testified that the work crews sometimes changed as the work progressed. (Tr. 181, 365.) It is undisputed, however, that the Tunnel crew earned more money than the Yard Crew because they worked longer hours. (Tr. 57.)

Chastka testified that the Respondent had a good relationship with the Union and Local 894 Union Business Agents Vernon Floyd and Bill Orr. At the busiest time, 35 Laborers were on the OCIT project. (Tr. 182.) Chastka testified that Respondent's typical procedure for layoffs involved contacting the Union's business agent prior to the layoff to let the Union know that a layoff was coming, but there was no formal documentation or paperwork provided until the day of termination. (Tr. 64; 102.)

2. Ivan Thompson started working on the Akron Project in August 2017

Ivan Thompson, an African-American journeyman member of Laborers' Local 894, was hired by the Respondent through the Union hiring hall in August 2017. (Tr. 710.) He started work on the project by helping to assemble the TBM. Ivan Thompson worked with his son, Monty

Thompson (also a Local 894 member), and employee Jason Dolan for approximately 2 -1/2 months on the TBM assembly. (Tr. 54–55.) All other employees at that time assisted in the assembly of the TBM, and there were not separate crews. (Tr. 54; 178–181) At that time, Jack Harris served as the foreman for Ivan and Monty Thompson. When the assembly of the machine was completed, the work force was split into crews. Ivan and Monty Thompson were moved to the Yard Crew where they performed general labor work. (Tr. 195) The Superintendent on the project was Mike Quinn, and in November 2017, Local 894 Laborer Mark Seese was promoted to Yard Foreman where he supervised Ivan Thompson, Monty Thompson, Elijah Dadbeth, Bill Heatley, Sherri Shaffer, Brandon Nucci, Mark Strong, Mia Turner, and Patricia Wheeler. (Tr. 197–198; 228–229; 713.)

In December 2017, the TBM temporarily stopped working during the tunneling and the Local Union was informed that employees would be laid off. An email was sent to the Union informing it that layoffs would occur with an attached chart identifying the employees that were being laid off and informing the Union that the Respondent intended to recall all those employees once the TBM was repaired. (GC Exh. 4; Tr. 68–69.) On that occasion, 5 to 6 employees (most of them from the Yard Crew) were laid off for the duration of time that the machine was down, which was approximately 2 to 3 weeks. (Tr. 69; 326–327.) Ivan Thompson was one of those employees who was laid off for 3 weeks. (Tr. 329; 726.) When the TBM started up again and there was work to perform, Thompson and the rest of the laid off employees were recalled around January 30, 2018. (Tr. 69; 329; 726.)

As part of the yard crew, Ivan Thompson's work consisted of an assortment of labor tasks, such as building sheds and small structures, maintain tools and Conex boxes by arranging the tools in them and sometimes bringing tools and parts to other employees, pulling parts and restocking parts in the shop, maintenance work outside and around buildings, performing general cleanup and yard maintenance, weed whacking and yard maintenance around fencing, packing lumber and other material for shipping, and assisting in the handling of deliveries or shipments, including "segments" that were shipped in by truck.[9] (Tr. 61–-62; 91–93; 714; 717–723; 918;1129–1130.) These tasks were the duties and functions of the entire yard crew, and not solely Ivan Thompson's responsibilities. (Tr. 1129.)

Foreman Mark Seese, a witness called by the General Counsel in support of its case-in-chief, testified that he was hired by Respondent in April 2017 and subsequently became a foreman for the first-shift Yard Crew in November 2017. (Tr. 197–198; 275.) He supervised Ivan Thompson for 8 months and he testified that Thompson's job duties consisted of "just general cleanup, housekeeping, [and] organizing [the Conex Boxes which held tools, parts, and equipment]." (Tr. 212.) Seese testified that he believed that Ivan Thompson was the most experienced yard worker based on his belief that Thompson had a "general knowledge" of where things were in the Conex Boxes and he was "very organized and clean." (Tr. 245–246) The record reveals that Ivan Thompson also performed a significant amount of segment work. Both Seese and Monty Thompson testified that Ivan Thompson performed much of the segment work, and

[9] The segments were concrete rings sections or liners that weighed approximately 11,000 pounds each. (Tr. 92.) Eight of the segments were attached together to form a circle or ring that formed the tunnel walls. (Tr. 92.) Chastka testified that Ivan Thompson worked on the segments for the entire project. (Tr. 918.)

Monty Thompson testified that he trained his father on how to perform that work and fill out the paperwork associated with the segment deliveries. (Tr. 211, 1273–1277.)

With respect to the duration of the project for the yard crew, Seese testified that Quinn told him that the Yard Crew would likely be working after the TBM broke through, and Chastka told him that the Yard Crew would be the last people on the jobsite for the Respondent. (Tr. 215–219.) There is no evidence, however, that either Chastka or Quinn gave any assurances that certain yard crew employees would be guaranteed to work on the jobsite to the very end of the project. With regard to the expected duration of Ivan Thompson's work for the Respondent, Seese testified that between the time shortly after he became a foreman in November 2017 and the time of the "broom incident,"[10] which occurred in or before June 2018, Superintendent Mike Quinn told him "multiple times" that Ivan (and Monty) Thompson would be the first ones removed from the jobsite. (Tr. 290–291.)

3. In early August 2018, Respondent had been preparing for a reduction in force because the tunnel work was coming to an end, and on August 7, 2018, it provided the Union with notice of the upcoming layoff

The record establishes that in early August 2018, the Respondent had been preparing for a reduction in force and it conveyed that fact to the Union. (GC Exh. 18) In that connection, in an August 7, 2018 email from Chastka to Bill Orr, Chastka informed him that "we should discuss the upcoming layoffs associated with the tunnel work coming to an end…." (GC Exh. 18.) Chastka testified that the yard crew was specifically going to have reductions in staff by virtue of the fact that the majority of the work that the yard crew was performing was winding down. (Tr. 139; 1133.) Chastka also testified that the TBM was getting close to reaching the retrieval shaft, which meant that the tunneling would soon be completed and the segment work would be come to an end. (Tr. 1137-1139)

4. In early August 2018, Local Union 894 Business Agent William Orr contacted Chastka regarding concerns the Union had about its Laborers

In early August 2018, Bill Orr contacted Chastka about concerns he had with the Respondent's treatment of the Laborers which stemmed from the terminations of Carrington

[10] As will be discussed more fully below, the "broom incident," which Seese testified he witnessed, occurred sometime between December 2017 and June 2018. (Tr. 288–289.) In that "incident," a laborer named Raychel Shaffer demanded that Monty Thompson take her to the shop to get a broom because he was in the truck. Monty Thompson refused. (Tr. 280–283.) According to Seese, Shaffer then walked over the bridge to the shop, and shortly after that Jack Harris came across the bridge "looking like he was on a mission headed toward Monty." (Tr. 282.) Harris, who was supposedly a close friend of Shaffer, apparently had words with Monty. Ivan Thompson, who was also present, got between Harris and Monty to break it up. (Tr. 752–756.) Ivan and Monty Thompson then went to the trailer to report what happened to Chastka, and Vern Floyd was called to the jobsite to intervene and he apparently resolved the situation. (Tr. 752–756.)

There is are no allegations or assertions by the General Counsel that Ivan Thompson's participation in the "broom incident" constituted protected concerted activity, or that he was in any way discriminated against in violation of the Act for his actions in that incident.

Chatman and Andre Dabne, two African-American Local 894 members on the Akron project.[11] (Tr. 101; 959.) Specifically, on August 7, 2018, Orr sent an email to Chastka regarding the termination of Chatman and seeking a justification for that action. (GC Exh. 18.) Chastka sent an email to Orr that same day explaining the reason he decided to layoff Chatman. (GC Exh. 18.) This lead to the Union raising concerns about the terminations of Chatman and Dabne. (Tr. 344–345.) On August 8, 2018, the Union, unsatisfied with Respondent's explanation regarding the terminations of Chatman and Dabne, requested a meeting under section 12 (Disputes and Grievances) under the Project Labor Agreement (PLA) in order to initiate step 1(a) of the grievance-arbitration provision. (GC Exh. 6.)

On August 9, 2018, Chastka met with Orr and Floyd about the grievance and the focus of that meeting, while initially on those two employees, turned into more of a global union concern over the Respondent's management practices regarding Local 894 affiliation and race. (Tr. 109–110.) The minutes from that meeting state that the reason for calling it was "to initiate the formal process to address unfair labor practices and discrimination of workers based on race and affiliation to Local 894." (GC Exh. 6.) In that meeting, the union officials provided photographs of what they believed showed disparate treatment toward Local 894 employees. Those photographs depicted Caucasian employees who were not Local 894 members working in the Tunnel (referred to as travelling laborers) who were engaged in conduct or infractions similar to that which Chatman and Dabne were accused of, such as talking on cell phones, smoking, sitting on buckets, and sleeping while on the job. (Tr. 111–115; GC Exh. 3.) Some of those Caucasian employees were written up but, unlike Chatman and Dabne, they were not discharged for those offenses. (Tr. 157–158.) Thus, one of the concerns that the Union brought to Chastka's attention between August 3 and 9, 2018, was that African-American Local 894 members were not treated similarly to the Caucasian employees or the non-Local 894 members. (Tr. 116; 962–963.)

Chastka's testimony confirmed that at the grievance meeting the Union raised concerns of disparate treatment and more of a "global problem" than just the two individuals. (Tr. 351–354.) He characterized it as a "[p]roblem of overall management and a feeling of our management discriminating based on local affiliation and race." (Tr. 354; 962–963.)

5. On August 9, 2018, even though the project was winding down, the Respondent hired some additional laborers to perform some needed work on the upcoming removal of the tunnel boring machine from the tunnel

Chastka testified that when the tunneling or mining was at "full tilt" he had two crews running the tunnel work and the Yard Crew was busy supplying support work. (Tr. 336–337.) He testified that he needed additional personnel, and on August 9, 2018, he hired additional laborers, such as Tyler Dettra, Bart Hanlon, and Cullen Rogers. (Tr. 338; 1177–1178.) Chastka testified that the Respondent anticipated the TBM would soon break-through in about a month (what he referred to as "holing through") and complete the tunneling by hitting the shaft. (Tr. 336–337.) Once that occurred, the Respondent needed the newly hired laborers to "prep for the mining machine to be able to come through the shaft wall, build a cradle, and [create] a surface to be able

[11] Andre Dabne's employment was terminated for allegedly sleeping on the job. (Tr. 349–352; 506.) Chastka indicated that the formal reason Chatman was terminated or laid off was that he was only with the Respondent for 2 weeks and "showed inconsistencies with attendance." (GC Exh. 18.)

to pull the machine out and rip it apart." (Tr. 1157–1158.) He described putting in "a cradle," as two large steel beams that get encased in concrete and which basically "catch the [tunnel boring] machine as it's coming out [of the shaft or tunnel] so you can get it to the point of demobilization." (Tr. 337.) In addition, due to the size of the crane and its placement against the mining shaft (which could collapse the wall), the Respondent needed to dig out and pour in concrete bases and put in "crane mats" to stabilize it pursuant to the "designer's recommendation. . . to make sure [they] didn't have any problems with the shaft." (Tr. 337.)

According to unrebutted testimony of Chastka, the Respondent was "still in full-tilt mining at that point, so [it] had both crews running the tunnel, and the yard crew was still busy, so [it] had to hire some additional guys to go take care of that work." (Tr. 337.) Thus, the record reflects that the additional laborers were hired to perform newly needed auxiliary work that had to be completed at the retrieval shaft where the TBM was going to come out of the tunnel, while the existing yard crew laborers were working in other areas on other tasks as they still had to perform their work while the mining was happening, and both types of work had to be completed at the same time. (Tr. 98–99; 337–338; 1157–1158; GC Exh. 32 (a) and (b); R. Exh. 6.)

6. Moncada's investigation during the week of August 13 - 18, 2018

After the August 9, 2018 meeting with the Respondent and Union failed to resolve the grievance, it progressed to the next step. That step was handled by Granite Construction's Corporate office out of Watsonville, California, on behalf of the Kenny/Obayashi Joint Venture. (Tr. 124.) The grievance was specifically handled by Catherine Moncada, who at the time held the title of labor relations manager for Granite Construction. (Tr. 423.) Moncada left California for Akron, Ohio on Wednesday, August 15, 2018, and she arrived on Thursday, August 16, 2018. (Tr. 1186; 1189.) It is undisputed that Moncada was acting on the authority of the Respondent while she was there to address the concerns raised by the Union in its grievance. (Tr. 125–126; 431.) Moncada interviewed Travis Heatley, Terry Quinn, and Jack Harris related to the grievance, which as she testified, initially concerned Chatman and Dabne. (Tr. 433–434.) That evening after the interviews, Moncada spoke to Union Business Agents Orr and Floyd at the union hall regarding the grievance. (Tr. 432–433.) They told her that the Union had concerns that went beyond those concerning Chatman and Dabne, and they specifically indicated that they had broader concerns related to discrimination based on race and union affiliation with respect to Local 894. (Tr. 433; 436–439; 966–967; 1191–1192) Moncada testified that, based on that information and the serious nature of the concerns raised by the Union, she decided to stay at the jobsite on Friday, August 17, 2018, and conduct a broader investigation, instead of flying back to California as planned. (Tr. 436–439; 547; 1191–1192.)

On August 17, 2018, Moncada went to the jobsite trailer at 144 Cuyahoga Street and initially interviewed non-Local 894 members, such as two to three operating engineers who worked on the OCIT job. (Tr. 1193.) She testified that in questioning those individuals, she was trying to find out whether allegations of "rampant discrimination" on the jobsite had merit, and she asked about the treatment of people and things people may have heard, witnessed, or observed. (Tr. 1193.) She also inquired about "double standards in place" between Local 894 members and nonmembers, supervisors and employees, African American employees and Caucasian employees, and African-American employees and Caucasian supervisors. (Tr. 1193–1194.)

When Orr and Floyd arrived at the trailer that morning, Moncada began her interviews of the Local 894 members. (Tr. 1194.) Moncada testified that her intent was to interview all the Local 894 members who were at the jobsite that day. (Tr. 1195) Moncada's interviews on August 17 for the Local 894 members were all in person in the conference room of the jobsite trailer and they were attended by Orr and Floyd,[12] who assured those being interviewed that they could be honest and open regarding the information they were providing. (Tr. 159; 442.) Moncada informed those being interviewed that they were there to discuss "double standards" or "racial issues." (Tr. 442.) She also gave them assurances that there would be no retaliation for participating in the interviews. (Tr. 548–549.)

Moncada conducted interviews on August 17, 2018, with approximately 17 laborers, and went on to interview approximately 26 individuals in total, including operating engineers that day. (Tr. 443–447.) Those interviewed included: Ivan Thompson, Monty Thompson, Mark Strong, Joe Minor,[13] Derrick Martin, Greg Daugherty, Mia Turner, Carl Johnson, Tim Snyder, Andrew Snyder, Mike Hayden, Alpha Souare, Mark Seese, Andre Dabne, Elijah Dadbeh, Matt Harris, Carrington Chatman, Sergio Meyricks, Alex Rodriguez, Cullen Rogers, and Eugene Riddick. (Tr. 553–554.) According to Moncada's testimony, from those interviews she uncovered reports of safety violations (such as sleeping on the job), the alleged use of the "N-word" by some management officials, and that some African-American employees conveyed their belief that if they committed rule infractions, they would not get a second chance and they would just quit their employment with Respondent, while some of the Caucasian employees who committed the same infractions would only get written up by the Respondent. (Tr. 556–559.)

Moncada testified that some of the Local 894 members she interviewed made some very specific complaints about their working conditions and the way they were treated by the Respondent's management personnel. (Tr. 1197–1206.) For example, Local 894 member Greg Dougherty, who worked on the Tunnel Crew, told her about double standards for people that he saw smoking in the tunnel. (Tr. 1197.) Moncada testified that Mark Strong informed her in his interview that he "felt that there was a culture of fear on the jobsite," and that he had a safety incident shortly after he started working there that he was afraid to report, and he was subsequently disciplined for failing to report it. Moncada testified that Strong also indicated that he was interested in seeing more diversity in Respondent's leadership.[14] (Tr. 1198–1199.) Moncada also specifically recalled that in Mia Turner's interview she stated: "It's all horrible" and that she was "uncomfortable being there." (Tr. 1199.) Turner also informed Moncada that she believed there was prejudice at the jobsite, race issues, "clickishness and favoritism," fear of retaliation, and she did not trust Jack Harris, her supervisor. (Tr. 1199–1201.) Employee Joe Minor informed Moncada in his interview that not many African Americans worked in the tunnel or remained in the tunnel if they were assigned to the tunnel crew. (Tr. 462) Monty Thompson was also interviewed and he informed Moncada about numerous concerns, including the "broom incident," which occurred approximately 6 months earlier. (Tr. 477.)

[12] The record establishes that without Moncada's knowledge, the Union officials surreptitiously recorded the interviews of numerous Local 894 members, including Ivan Thompson.

[13] The record reflects that Joe Minor was also referred to as "Sparky Joe," and that he was an IBEW member. (Tr. 1215.)

[14] Yard Foreman Mark Strong was also called by the Respondent on its case-in-chief, where he testified that in his interview with Moncada, he told her that there was "[a]n air of fear among the employees" that if you made a mistake there were no second chances, and that "there was nepotism." (Tr. 1026–1027.)

Ivan Thompson also presented complaints to Moncada concerning his conditions of work and his personal observations of the treatment of employees by Respondent's supervisors and managers. The record establishes that what was said in Moncada's interview with Ivan Thompson, which lasted about 30 to 45 minutes, is essentially undisputed. (Tr. 443; 744) In that interview, Thompson was "very animated," and he claimed that supervisor Jack Harris was a racist and "the most fucked-up person in the world."[15] (Tr. 452; 744; 968–972; 1201) Moncada testified that Thompson based those assertions on the fact that Harris had earlier referred to him as a "boy" in front of his son, Monty, which upset him. (Tr. 443–444; 1201.) Thompson testified that within 2 weeks of starting to work on the assembly of the TBM with Jack Harris as his supervisor, Harris asked Thompson's foreman at that time, Jason Dolon: "Jason, what you got your boys doing today?" (Tr. 745; 857–859.) Thompson told Moncada that Harris' statement was disrespectful towards him. (Tr. 745–746.) Like his son Monty, Ivan Thompson also told Moncada about the "broom incident" which was an incident that occurred much earlier, when he was working on the yard crew with Monty. As Monty informed Moncada, Ivan Thompson described how Raychel Shaffer directed Monty to get her a broom, and Monty told her he would not do so and that she should get her own broom.[16] According to Ivan Thompson, Harris "got in his son's face," words were exchanged, and he had to get between them to break it up. (Tr. 755–756.) That incident was cited by Ivan Thompson as further evidence of what he believed was racial discrimination. (Tr. 752–756.)

In addition, Ivan Thompson complained that Harris (whom he believed was a racist) did not place him on the tunnel crew after the TBM was built, which allegedly resulted in his loss of money because the employees in the tunnel worked more hours and were thus paid more than the yard crew employees.[17] (Tr. 445–447; 746; 991.) Thompson also testified about an incident with a carpenter who he and Monty were helping build stairs early in the OCIT project. In that incident, Ivan Thompson told Moncada that he and Monty were replaced on a Saturday for that work (which paid overtime) by two white employees (Raychel Shaffer and Andy Snyder). (Tr. 1202–1203.) Ivan informed Moncada that he believed that action was racist. (Tr. 749–753; 849; 1203.) Thompson also complained to Moncada that no other Blacks, except an employee named Carl, got to work in the tunnel, and he asserted that Blacks were generally under-represented in the tunnel. (Tr. 462–463; 754–755; 974; 989–991; 1202.) Thompson also raised to Moncada several additional incidents that he believed constituted racial discrimination, including the termination of African-American employee Cedric (Ricky) Coleman, whom he believed was discharged before he was allowed sufficient time to learn his job. (Tr. 780–781.) In addition to Coleman, Thompson told Moncada that the Respondent terminated an un-named "African guy" because management could not understand his "heavy accent" despite Respondent's retention of a non-African American employee named Contaro (who he described as a "Chinese guy"), and who was similarly difficult to understand due to his accent. (Tr. 781–783.)

[15] Moncada also testified that Ivan Thompson told her that Jack Harris was "the most fucked-uppest person in the world." (Tr. 452.)

[16] Ivan Thompson described the female laborer as Jack Harris' "little pet." (Tr. 753.)

[17] Regarding Thompson's assertion of an alleged loss of pay, he later testified that he allegedly lost $40,000 because Harris denied him from working in the tunnel. (Tr. 855.)

While Thompson testified that most of his complaints in his interview concerned Jack Harris, he also brought up safety issues and how he believed they were handled unfairly at the jobsite. (Tr. 760; 849; 974.) In that connection, Thompson informed Moncada that when he failed to wear gloves on the job, he was yelled at by supervision while other employees were not yelled at for the same offense. (Tr. 757–760; 849.) In addition, Thompson also told Moncada about several African-American workers who were hired to work in the Tunnel but were soon fired thereafter, and the fact that when he was laid off there was still work left in the yard to perform. (Tr. 780–789.)

Despite Ivan Thompson's complaints about Jack Harris, he testified that Superintendent Mike Quinn was a "good guy" who was "fair," and someone he would go to before he would go to anyone else. (Tr. 850.) Thompson also testified that Mike Quinn was the type of person "[he] could work for. . ." and that he had ". . . a fair shot with [Quinn]." (Tr. 850-851) He also said of Quinn: "No matter what is happening, he is going to be fair." (Tr. 852) Likewise, with regard to working for Project Manager Dave Chaskta, Ivan Thompson stated that he ". . . was a good guy and you could go to him," and "[h]e was a fair dude and he would handle any situation that you came to him with." (Tr. 853.) In addition, Thompson testified that during his interview with Moncada, she seemed sincere about listening to his concerns and she gave him her business card and told him to call her if he had anything else to tell her. (Tr. 846–847.) There is no evidence that Thompson made any such calls to Moncada.

Chastka and Mike Quinn were both out of town during the interviews conducted by Moncada August 17, 2018, and they did not participate in the interviews of the employees in any way.[18] (Tr. 921.)

7. The events that occurred after Moncada's interviews on August 17, 2018 and before the layoff of employees on August 24, 2018

On Saturday, August 18, 2018, Moncada returned to the jobsite to interview more operating engineer employees. (Tr. 1207.) Moncada testified that she finally got to meet with Chastka because he just returned after being unavailable all week. (Tr. 1207)[19] Moncada met in person with Chastka on Saturday, August 18, 2018, and discussed the allegations she was investigating, but did not discuss the details of the individual interviews. (Tr. 473; 525–-531.) Chastka likewise testified that he did not speak with Moncada about her findings in the investigation, and she did not show him any of her notes or tell him what was said in any of the interviews she conducted on August 17, 2018. (Tr. 355.) After meeting with Chastka on August 18, 2018, Moncada left Akron, Ohio to return to California, and Chastka returned to work at the job site on Monday, August 20, 2018. (Tr. 104; 356.)

[18] David Chastka testified that he was present for a telephone discussion between Moncada and Jack Harris, wherein Moncada wanted to get Harris' side of the story concerning his alleged use of the "n-word" and other "slang terms." Chastka testified that Harris asked him to be present for that telephone call. (Tr. 923–924.)

[19] Chastka left Akron, Ohio, on August 14 and he returned on August 17, 2018, at 10 p.m. EST. (Tr. 355.)

On August 20, 2018, Moncada sent an email to Chastka[20] thanking him for his help and cooperation with the investigation of the allegations made by the Laborers Union. In an effort to gather information about things that had come up in the interviews on August 17, 2018, she also requested certain information and she reminded him that the information they discussed, and the requested information to follow, were confidential. (GC Exh.10; Tr. 473–525–531.) In that email, she specifically informed Chastka that she conducted 26 interviews but needed additional information such as: timecard logs for Mark Seese's timecards; written warnings for employees; whether the "belt" was running when Dabney was terminated for sleeping; any previous warnings for Dabney; whether Monty Thompson was earning an overscale rate; documentation for "Take 5" meetings; whether he had a contact number for Jason Dolon because she wanted to speak to him; whether there was any written documentation of the "Broom incident;" information on the employment and layoff of Alfred Squire; a narrative concerning Carl Johnson's return to work from FMLA; a narrative on Jason Quinn's employment; the steps taken to enforce PPE policies; video of portal time stamped with Chapman leaving work; and any paperwork on Charles Berner's employment who was allegedly overheard using the expression "the n*****s in the back," and who allegedly heard that expression. (Tr. 474–476; GC Exh. 10.) With regard to Moncada's mention of the "broom incident," she testified that it was a "site-wide. . . dramatic event that had happened six months [earlier]" and "everyone knew what the broom incident was." (Tr. 476.) Moncada acknowledged that the broom incident came up in multiple interviews, and obviously it was mentioned in both Ivan Thompson's and Monty Thompson's interviews. (Tr. 474–482) She testified, however, that while she may have conveyed the nature of the allegations from the investigation and she requested information concerning the "broom incident," she did not convey the details of what individual employees said in their interviews to Chastka or Quinn, including, in particular, Ivan Thompson's statements. (Tr. 355.)

After Moncada returned to California, she completed her investigation. She testified that she went through the information and validated it the best she could, and then evaluated it against the allegations. (Tr. 1228.) She testified that the allegations that were "concrete" could not be substantiated, and that there was an FMLA issue that she rectified. (Tr. 1228.) Moncada testified that notwithstanding her findings, the EEO policy was re-issued to employees and outside counsel was secured to perform diversity training on the jobsite for employees and supervisors. (Tr. 1229) Chastka likewise testified that, concerning the investigation's findings, Moncada informed him that regardless of any findings, the Akron job needed to have people come out and reaffirm the Respondent's EEO policy because, whether they were doing something wrong or not, "the stir it had created needed to be calmed down," and they talked about the Human Resources department doing diversity training in the daily jobsite "Take 5" meetings. (Tr. 357–358.) Moncada also testified that after her investigation she sent Orr an email informing him that she was unable to substantiate the Union's claims, and he responded that the Union would move forward with what they needed to do. (Tr 500.) In an email sent Wednesday, August 22, 2018, Orr mentioned to Moncada that his Laborers spoke openly and freely and in good faith, and he hoped retaliation would not become an issue. (Tr. 502–503; GC Exh. 16.)

[20] Moncada also sent the email to John Criss, but she testified that she was "continuing the investigation by eliciting additional information from Dave Chastka." (Tr. 475.)

8. The Respondent laid off employees as part of a reduction in force on August 24, 2018, which included Ivan Thompson

As the primary portion of the project was coming to an end and yard crew work started to slow down in August 2018, the reduction in force began on August 24, 2018, only a few days before the TBM broke through the retrieval shaft. At the time of the layoff in August 2018, there were six employees on the Yard Crew that consisted of Foreman Mark Seese, Mark Strong, Ivan Thompson, Monty Thompson, Mia Turner, and Patricia Wheeler. (Tr. 1129.) The primary responsibility of the Yard Crew at that time was to "feed the tunnel" by receiving segments and materials, organizing the shops or Conex Boxes, and general housekeeping. (Tr. 1129.) Ivan Thompson assisted in conducting inventories of the Conex Boxes, helping to organize and stock material in those Conex boxes, and dealing with much of the delivery of materials at the site, such as the concrete segments. (Tr. 96.) That fact that the project was just a few days away from the TBM breaking through the retrieval shaft meant that the OCIT project would not be receiving any additional concrete segments, and in fact, the last segment was delivered to the jobsite on August 22, 2018. (R. Exh. 8 and 9.)

Chastka testified that he was in a conference in California and had come back to work on Monday, August 20, 2018. (Tr. 104.) During the beginning of that week, he contacted Union Business Agent Floyd by phone. Floyd then went to Chastka's office where Chastka presented a list laying out the employees Chastka thought he was "going to let go of." (Tr. 103; 1155–1156.) Those employees were Mark Seese, Ivan Thompson, Patricia Wheeler, and Monty Thompson. (Tr. 102–103; 934) According to Chastka, Floyd reviewed the list, but he "didn't really say anything," and he did not raise concerns at that time about who was chosen for the reduction in force layoff. (Tr. 1155–1157.) Floyd acknowledged that Chastka showed him a document that indicated that Patricia Wheeler, Ivan Thompson, Monty Thompson, and Mark Seese were going to be laid off. (Tr. 643–644.) While Floyd testified that he was "shocked because there were no complaints about [those employees]," he did acknowledge that when Chastka showed him the list of those to be laid off, he did not say he was surprised that Ivan Thompson was being laid off, he did not ask Chastka to change his decision to lay off Ivan Thompson, and he did not convey to Chastka that he thought the layoff of Ivan Thompson or any of those employees was unfair. (Tr. 645–646; 650.)[21]

Mike Quinn testified that he told Ivan Thompson that he was being laid off when he handed him his paycheck on August 24, 2018, and that he informed Thompson that they were having a reduction in force. (Tr. 1093.) Ivan Thompson testified that he knew he was being laid off when Mike Quinn gave him his paycheck on August 24, 2018, even though Quinn allegedly never said anything to him about his layoff when he handed him the paycheck. (Tr. 733.) However, Thompson later testified that when he was given his paycheck, he asked Quinn how many employees were getting laid off, and Quinn simply stated, "about 4." (Tr. 838–839.) Thereafter, Thompson changed his testimony again, further testifying that he did not ask Quinn how many people were getting laid off, but "how many people had checks that day." (Tr. 843) In any event,

[21] Business Agent Orr did, however, send Moncada an email dated August 22, 2018, in which he mentioned "retaliation" and stated that ". . . [m]any laborers that I represent spoke openly and freely and in good faith that there would be no retaliation…" and he hoped "that this does not become an additional issue to deal with in the future." (GC Exh. 16.)

Thompson testified that he told Quinn: "Well, I guess we all have to go sometime." (Tr. 733; 846.) Thompson then left the jobsite.

While Ivan Thompson, Pat Wheeler, and Mark Seese were laid off that day,[22] Chastka testified that he changed his mind about laying off Monty Thompson because he found out from Mike Quinn that Monty was at the hospital with his wife for what he believed was the birth of his child.[23] (Tr. 935–936.) On the day of the layoff, Chastka told one of the union business agents that he was not going to lay Monty off at that time because "he didn't feel right about it." (Tr. 935-936.) Therefore, Monty Thompson was not laid off and he continued to work. (Tr. 936.) Chastka further testified that he subsequently realized there was in fact some work for Monty Thompson to do, so he kept him on the job until October 2018, when he was laid off or let go. (Tr. 938–939.)

9. The record establishes that Chastka made the decision to lay off Ivan Thompson as part of the reduction in force, and there is no direct evidence that Moncada's investigation or the statements made by Thompson in his interview were a basis for his layoff

The evidence does not establish that Moncada's investigation played a role in Respondent's decision to implement a work force reduction in the form of a layoff on August 24, 2018. (Tr. 1323.) Chastka's testified that such a reduction was going to happen regardless of the investigation, due to the fact that much of the work on that project was starting to wind down. (Tr. 1323–1324.) Chastka's testimony was undisputed, as was his testimony that he made the ultimate determination with respect to laying off employees, with input from Mike Quinn. (Tr. 1323.) In particular, Chastka's testimony that he made the decision to include Ivan Thompson in the reduction in force, and that he did not rely in any way on Moncada's investigation or the interviews she conducted, was unrebutted. (Tr. 1324.) Chastka's testimony that Moncada played no role in the reduction in force and that between August 18 and 24, 2018, Moncada did not share her notes from the investigatory interviews with him, was likewise unrebutted. Furthermore, his testimony that she did not inform him of the specific statements made in that investigation by the employees, including those made by Ivan Thompson, was similarly uncontradicted and unrebutted. (Tr. 356; 1161–1162; 1218; 1324.) Likewise, Moncada's testimony that she did not share any of her findings or recommendations with Chaskta at that time was also uncontradicted. (Tr. 356.) Thus, there is no direct evidence that Moncada's interview had anything to do with Chastka's and Quinn's decision to include Ivan Thompson in the Respondent's reduction in force layoff on August 24, 2018.

While Moncada did not share her findings or recommendations from the investigation or have anything to do with the decision to lay off Ivan Thompson, she did ask Chastka in an email dated August 20 for information that she believed was needed for her investigation, such as time cards, and he provided it. (Tr. 357; 370; 1159; GC Exh. 10.) While some of the information requested concerned some allegations and complaints made by Ivan and Monty Thompson,

[22] Kevin Truitt, a laborer from Local 894, was also laid off or discharged at that time. However, he had approached management and requested a layoff for health reasons. (Tr. 1142.) The record reflects that Patricia Wheeler, although part of the yard crew, had just been assigned to a new site on the project shortly before she was let go on August 24, 2018. (Tr. 229.)

[23] Monty Thompson testified that he did not specifically recall, but he believed he was not at work on August 24, 2018, because he was at physical therapy. (Tr. 1282.) He did testify, however, that his child was born on August 25, 2018. (Tr. 1282.)

Chastka's and Moncada's testimonies that the identities of the specific employees and their specific statements and allegations made in their interviews were never shared prior to the decision to include Thompson in the reduction in force, were unrefuted. Furthermore, as mentioned above in the August 20 email, while Moncada requested numerous items of information, some of which concerned complaints raised by Ivan and Monty Thompson (such as the broom incident), Ivan Thompson's name was never raised in that email and the information requested did not identify any of Thompson's statements he made in his interview. (GC Exh. 10.) Likewise, in an email from Moncada to Chastka dated August 23, 2018 (GC Exh. 12), which was one day prior to Ivan Thompson's layoff, she apprised Chastka of the status of her investigation, but nowhere in the email is Ivan Thompson's name mentioned, nor are there any concerns raised that specifically state what information Ivan Thompson provided in his interview. Thus, there is no direct evidence that Chastka's involvement in the investigation went beyond supplying information to Moncada upon her request.

With regard to Chastka's decision to include Ivan Thompson in the layoff, he testified that he had conversations with Mike Quinn that concerned termination or layoff decisions, and that he did have such conversations with Quinn regarding Ivan Thompson's layoff. (Tr. 363.) Consistent with that assertion, Quinn acknowledged that he recommended to Chastka that Ivan Thompson be included in the reduction-in-force layoff with Seese, Monty Thompson, and Patricia Wheeler, and that he had not consulted with anyone regarding his recommendation. (Tr. 1081–1082; 1116.) Like Chastka, Quinn testified that Moncada did not discuss any of the laborers' interviews with him (including Ivan Thompson's interview), and she never shared her notes or her findings from her investigation with him. (Tr. 1083–1084.) In fact, Quinn was on vacation during the time period when Moncada was visiting the jobsite and conducting interviews, so he had a telephone interview with Moncada after she left the jobsite and after he returned to work from his vacation. (Tr. 1087–1088.) He testified that although he could not recall the date, his interview occurred when Moncada called him on his cell phone. (Tr. 1088.) Furthermore, Quinn testified that in his interview, Moncada did not specifically ask him about Ivan Thompson. (Tr. 1099.)

The record shows that Mike Quinn's call log from the telephone company established that he spoke to Moncada on August 24, 2018, at 11:14 a.m. EST. Ivan Thompson's Timecard Report showed that his hours for August 24, 2018 were coded as "layoff," meaning that he was laid off that day. (Jt. Exh. 3(a) at 1860; Tr. 1303–1306.) The Respondent's timecard status report which showed dates, times, and changes made to timecards, revealed that the layoff decision was sent to payroll on August 24, 2018, at 9:21 a.m., which was two hours before Moncada conducted her interview and spoke to Quinn. (R. Exh. 14) This evidence was consistent with Moncada's testimony that she spoke to Mike Quinn on August 24, 2018, around mid-morning, and her assertion that her notes supported her recollection because her notes ended the previous day on August 23, 2018, at 2:08 p.m., which would have been 5:08 p.m. in Ohio, a time that is "after-hours" Ohio time, and she testified that she would not have spoken to him that late in the evening. (Tr. 1237–1238.) Thus, the documentary evidence is consistent with the assertion that Moncada telephoned Quinn on August 24, 2018, at 11:14 a.m. EST, 2 hours after Ivan Thompson was laid off, and that the duration of the call was 58 minutes. (R. Exh. 15.) Thus, Quinn's testimony that Ivan Thompson's interview played no role in his recommendation to include Thompson in the August 24, 2018 layoff was also supported by the record evidence. (Tr. 1084.)[24]

[24] Moncada testified that she was not involved in any hiring or firing decisions on the OCIT Akron

With regard to the reason that Ivan Thompson was included in the layoff, Chastka testified that it was not because he was unable to perform yard work, or that he had a problem with discipline, or that he did not consider Thompson to be a "team player."[25] (Tr. 927–929.) Instead, Chastka testified that Thompson was chosen as one of the employees to be laid off because "the work was slowing down and [the Respondent] needed to let go of people." (Tr. 927–928; 1128; 1139.) In that connection, Chastka testified that the last delivery date for segments at the jobsite was August 22, 2018, and a substantial amount of work that the yard crew, and in particular Ivan Thompson, played a substantial role in, was winding down. (Tr. 1132–1133; 1139; 1322.)

Chastka also testified without contradiction that when he had to select employees to be laid off pursuant to a reduction in force, he looked at the technical aspects and who he thought was going to work best together to get the work done. (Tr. 1158.) Chastka stated that he used that approach for the August 24, 2018 layoff. In that connection, Chastka specifically testified that Ivan Thompson was included in the layoff because he had to make a decision, going from 6 to 2 laborers, as to who would be the best fit and Ivan Thompson was not one of those two individuals. (Tr. 1140.) Chastka testified that Ivan Thompson was not selected for layoff because he was not a team player, but he did consider "teamwork and ability" in his decision and he determined that Thompson was not in the top two for those criteria. (Tr. 1140.) Chastka further testified that "sometimes [you have to choose] between two good people," and he approved Quinn's recommendation for those who were laid off. (Tr. 1141.) Likewise, Quinn testified that he recommended that Ivan Thompson, Mark Seese, Patricia Wheeler, and Monty Thompson be included in the reduction in force because with the TBM being dissembled, the yard work was declining, and they did not need as many people in the yard crew.[26] (Tr. 1080–-1081; 1089.)

The evidence established that when the Respondent was close to having the tunnel break through at the retrieval site, that meant that no more concrete segments used to build the tunnel walls would be delivered at the jobsite, and, in fact, the last segment was delivered to the jobsite on August 22, 2018. (R. Exh. 8 and 9.) After the tunnel broke through, "everybody did whatever [was] needed done," and "it was not a segregated activity." (Tr. 940.) The crews were therefore no longer functioning as traditional "crews," as the employees were completing the remaining tasks as needed. The evidence further established that the Respondent hired some laborers up to August 9, 2018, which Chastka testified was needed because auxiliary work existed and needed to be completed at the retrieval shaft where the TBM was going to come out of the tunnel. Therefore, other laborers were hired to complete that work since the remaining laborers on the project at that time were working in other areas on other tasks. (Tr. 98–99; GC Exh. 32 (a) and (b)) On that matter, Chastka testified that "it was a timing issue" because "the Yard crew still had to perform

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project, and she did not make any recommendations to Chastka regarding the discharge or layoff of employees. (Tr. 1231.)

[25] It is undisputed that Ivan Thompson never received any discipline from the Respondent and that his supervisors complimented his work. Specifically, Thompson's testimony that Mike Quinn and foreman Mark Seese told him he was doing a good job was unrebutted. (Tr. 740.) In fact, Chastka admitted that Ivan Thompson was a good worker, he was never disciplined, and he did not have any safety violations. (Tr. 91; 1129.)

[26] Mike Quinn testified that they changed their mind about laying off Monty Thompson because Chastka did not think it was right to lay him off when he was in the hospital with his wife having a baby. (Tr. 1081–1082; 1142.)

their work while the mining was happening," and the Respondent needed the newly hired laborers to "prep for the mining machine to be able to come through the shaft wall, build a cradle, a surface to be able to pull the machine out and rip it apart." (Tr. 1157–1158.) There was thus no evidence to rebut Chastka's testimony that Respondent needed to bring on new hires to perform that work because the yard crew was performing other work and both types of work had to be completed at the same time. (Tr. 1158.)

10. The events that occurred after the August 24, 2018 reduction in force layoff

The record reveals that after the August 24 reduction in force, Mark Strong, Mia Turner, and Monty Thompson remained on the yard crew.[27] (Tr. 1157.) The Respondent "broke through" on the tunnel on August 30, 2018, and the mining work ended the first week of September 2018. (Tr. 338; 386.) After the TBM broke through and completed the tunneling, the machine was disassembled and removed from the site. (Tr. 172) According to Chastka, Mark Strong continued to work as the yard crew foreman and laborers Cullen Rogers and Derek Martin continued to work in the yard. (Tr. 939–940.) Chastka testified that after the TBM completed the mining, disassembling the machine took months and some of the employees who were tunnel workers subsequently worked on the surface or yard pulling parts, packaging up items, and shipping them out. (Tr. 941–943.) According to Chastka, it was not "segregated work" at that point. (Tr. 941–942.) The remaining Laborers also assisted in packing up the project, with the Conex Boxes being inventoried and supervised by an operating engineer. (Tr. 96.)

As part of the reduction in force that was instituted on August 24, 2018, the layoffs continued for the next several months into the beginning of 2019. (Tr. 185.) The Respondent continued to reduce its work force over the next several months from nearly 60 employees prior to August 2018 to approximately 11 union employees at the time of the instant hearing in this case. (Tr. 186; R. Exh 6.) Specifically, from August 24, 2018 to November 30, 2018, in additional reductions to the work force, employees were laid off or terminated, including several of whom participated in Moncada's investigation and interview.[28] (Tr. 186–187.) As of the date of the hearing, the project was nearly completed and the crew had been reduced to a substantially smaller size, including superintendents, foremen, laborers, operating engineers, and oilers. (Tr. 186.) In regard to the laborers, the Respondent had only two foremen and five laborers as of the date of the hearing. (U Exh. 2.) In addition, the tunnel work was 100 percent checked off, and the remaining work included managing the subcontractors that were building surface structures and performing

[27] Some of the employees hired in July and August 2018 were not laid off as part of the reduction in force, including Mark Strong, who was hired in July 2018 to perform yard work. The record shows that Mark Strong was still working at the jobsite as of the time of the hearing in this matter. (Tr. 99.)

[28] The record shows that the following employees were laid off as part of a reduction the work force (with their respective end dates and recorded reasons if other than for a "reduction in force"): Chuck Bush (9/5/18); Tyler Dettra (9/7/18); Bart Hanlon (9/7/18); John Chesser (9/17/18)(layoff—mutual agreement—took another job); Derrick Martin (10/18/18); Adam Schemrich (10/18/18); Cory Friedman (10/19/18); Cody Pratt (10/19/18); Curtis Ball (10/23/18) (layoff—voluntary—took another job); Carl Johnson (11/2/18); Timothy Snyder (11/2/18); Greg Daugherty (11/21/18); John Oster (11/21/18); Cullen Rogers (11/21/18); Josh Spaulding (11/21/18); Michael Trump (11/21/18); Jack Zager (11/21/18); Bill Heatley (11/30/18); and Travis Heatley (11/30/18). (R. Exh 6) Of these employees, the following were interviewed by Moncada as part of her investigation: Greg Daugherty, Travis Heatley, Carl Johnson, Derrick Martin, Cullen Rogers, and Timothy Snyder. (Tr. 434; 553–554.)

some additional change orders which the City of Akron contracted for later in the project. (Tr. 185.)

B. The Contentions of the Parties

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily laying off and/or terminating Ivan Thompson for participating in Respondent's investigation on August 17, 2018, into the discrimination grievance filed by the Union and "in response to voicing his concerns and criticisms to Labor Relations Manager Catherine Moncada that Respondent's supervisors and managers discriminated against jobsite employees on the basis of their race and their union affiliation." (GC Br. pp.1–2, 7.)

The Respondent argues that the General Counsel did not make a prima facie case of discrimination because Thompson was not engaged in union or protected concerted activities, and even if he was engaged in such protected activities, the Respondent's officials who decided to lay him off as part of the reduction in force did not have knowledge of those activities, and there was no animus on the part of the Respondent. Thus, the Respondent contends that the General Counsel did not meet his burden of proving that Thompson's layoff was motivated by discriminatory reasons.

C. Analysis

1. Catherine Moncada's status as an agent of the Respondent within the meaning of Section 2(13) of the Act

While the Respondent admitted that Project Manager David Chastka and General Superintendent Michael Quinn were supervisors and agents within the meaning of Section 2(11) and (13) of the Act, it denied the allegation in the Amendment to Complaint that Catherine Moncada was an agent of the Respondent within the meaning of Section 2(13) of the Act.

Section 2(13) of the Act states:

> In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board and the courts have long held that in determining whether a person acts as an agent of another, the Board applies the common-law principles of agency. *Dr. Rico Perez Products*, 353 NLRB 453, 463 (2008); *NLRB v. Longshoremen (ILWU) Local 10 (Pacific Maritime Assn.)*, 283 F.2d 558, 563 (9th Cir. 1960), enfd. as modified 123 NLRB 559 (1959). Under the common-law rules of agency, an agency relationship can be established by vesting an agent with actual or apparent authority to act on behalf of the party. *Cornell Forge Co.*, 339 NLRB 733 (2003). Actual authority is "created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent takes action on the principal's behalf." *Restatement (Third) Of Agency, Section 3.01* "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when

a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Restatement (Third) of Agency, Section 2.03.*

The Board has held that the burden of proving any type of agency "rests with the party asserting that relationship." *Millard Processing Services*, 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994); See *Pan-Oston Co*., 336 NLRB 305, 306 (2001); see also *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948).

Catherine Moncada testified that she currently holds the title of Director or Labor Relations for Granite Construction, and that in August 2018, she held the position of Labor Relations Manager for Granite Construction. As the labor relations manager, she also represented Kenny Construction, a wholly owned subsidiary of Granite Construction, in its labor relations matters. (Tr. 422; 951–952.) She also represented the Kenny/Obayashi Joint Venture in its labor relations matters, which included its Project Labor Agreement and collective-bargaining agreement. (Tr. 422–423; 952.) As Labor Relations Manager, her duties included implementation of company-wide labor strategy, the negotiation of collective-bargaining agreements, grievances and dispute resolution, contract management, and labor compliance. (Tr. 1185.) Her job description for the Labor Relations Manager position states that she was "responsible for managing the day to day activities of the Labor Relations Department to ensure efficiency and attainment of operating goals." (GC Exh. 26; Tr. 951.)[29]

Moncada testified that she traveled to the Akron project site to handle the grievance filed by the Union, and she was acting on the authority of the Respondent while she was there to address those concerns. (Tr. 431.) The investigation she was conducting was on behalf of Kenny Construction and the joint venture, and it was part of her duties to handle grievances for Kenny Construction. (Tr. 1243–1244.) Moncada also testified that she was responsible for implementing policy with respect to human resource issues, wages, and other terms and conditions of employment for Kenny Construction and the joint venture. (Tr. 1245.)

Chastka testified that when Moncada conducted interviews to determine if the Union's allegations had merit, she was acting on behalf of the Respondent. (Tr. 129.) Chastka's testimony was corroborated by Moncada, who testified that with regard to the relationship between Granite Construction, where she was employed, and the Respondent's joint venture, she acted on behalf of those joint venture entities when there were labor disputes. (Tr. 489–490.) With regard to her agency status, Union Organizer Bill Orr testified that Moncada informed him that she served as representative of the Respondent with respect to the latter levels of the grievance process. (Tr. 546–547.) Moncada also acknowledged that in Ivan Thompson's interview with her, she informed him that she was there on behalf of the corporate office to interview him and to discuss the allegations. (Tr. 518–519.)

[29] The job description also lists her essential job accountabilities as, inter alia, "assisting with evaluation, development, and implementation of department policies, practices, and procedures to ensure compliance with terms of labor contract provisions, including wages, hours, and working conditions and applicable law in attainment of operating goals;" interpreting collective-bargaining agreements, administering grievance procedures, ensuring compliance with collective-bargaining agreements; and monitoring and analyzing costs, overseeing preparation of budgets and coordinating activities of other departments to ensure efficiency and economy. (GC Exh. 26.)

I find that the Respondent conferred actual authority upon Moncada by identifying her as its representative in labor relations matters and, in particular, the investigation and processing of the Union's grievance, which became more about a "global problem" of disparate treatment and a "[p]roblem of overall management and a feeling of our management discriminating based on local affiliation and race." (Tr. 351–354; 962–963.) As mentioned above, both Moncada and Chastka acknowledged that Moncada acted on behalf of the Respondent regarding labor disputes and she was responsible for its labor relations matters, including the processing of the PLA and the grievances filed by Local 894. Respondent clearly vested Moncada, as its agent in its labor relations matters in in processing of grievances, with actual authority to act on the Respondent's behalf and to bind it to her determinations on those matters. Moncada's actions were also consistent with her possession of such actual authority as she held herself out to the Union representatives and employees such as Ivan Thompson as an agent of the Respondent who possessed actual authority.

Thus, based on the above evidence, I find the record establishes that Moncada was vested with actual authority on the Respondent's behalf, and I find that she was an agent of the Respondent within the meaning of Section 2(13) of the Act.

2. The Respondent's layoff and/or termination of Ivan Thompson on August 24, 2018

a. The law

Section 7, the cornerstone of the Act, provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." To ensure that employees are free to exercise their Section 7 rights without fear of reprisal, Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate against employees "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In addition, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Thus, the Act prohibits employers from discriminating against employees by discharging them on the basis of their union activities and/or for exercising their organization and collective-bargaining rights, including their right to engage in concerted activities for the purpose of mutual aid and protection. See *MCPC Inc. v. NLRB*, 813 F.3d 475, 479 (3d Cir. 2016).

In analyzing this case, I note that where employers argue that they discharged employees for reasons unrelated to their protected activity, the Board and the courts rely on the so-called "mixed motive" or "dual motive" discharge test set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983); See also *MCPC Inc. v. NLRB*, 813 F.3d 475, 490 (3d Cir. 2016). In *Wright Line*, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) of the Act turning on employer motivation. Under *Wright Line*, the General Counsel bears an initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action at issue. Id. at 1089. The General

Counsel satisfies the initial burden under *Wright Line* by showing that: (1) the employee engaged in union and/or protected concerted activity; (2) the employer had knowledge of that activity; and (3) there was animus against that activity on the part of the employer. *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op. at 1 fn. 3 (2019); *Strongsteel of Alabama, LLC*, 367 NLRB No. 90, slip op. at 1 (2019); *Donaldson Bros. Ready Mix,* 341 NLRB 958, 961 (2004); *L. B. & B. Associates, Inc. d/b/a North Fork Service Joint Ventures*, 346 NLRB 1025, 1026 (2006); *Willamette Industries*, 341 NLRB 560, 562 (2004); See also *DHL Express (USA), Inc.*, 360 NLRB 730 (2014).

The Board's *Wright Line* test is, and has always been, inherently a causation test. *Tschiggfrie Properties, Ltd*., supra at slip op. 8. In that connection, the Board, in clarifying the General Counsel's initial burden under *Wright Line*, and in particular its requirement of evidence of animus, has held that circumstantial evidence of any animus or hostility toward union or protected concerted activity is not enough to satisfy that burden. *Tschiggfrie Properties, Ltd*., supra slip op. at 8. To meet that initial burden, the evidence of animus must support a causal relationship between the employee's union or protected concerted activity and the employer's adverse employment action. Id. slip op. at 1.

It is well established that proof of animus or discriminatory motivation can be based on direct evidence or, under certain circumstances, it may be inferred from circumstantial evidence based on the record as a whole. See *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003); See also *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992). As support for an inference of unlawful motivation, the Board may rely on, among other factors, disparate treatment of the affected employee and the timing of the discipline relative to the employee's protected activity. See *Embassy Vacation Resorts*, supra at 848. In addition, the Board may infer animus against protected activities from pretextual reasons given for the adverse employment action. *DHL Express*, supra, slip op. at 1 and fn.1. When an employer's stated reasons for its decision are found to be pretextual—that is, either false or not in fact relied upon—"discriminatory motive *may* be inferred, but such an inference is not compelled." *Electrolux Home Products*, supra, slip op. at 3. "If [a trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where…the surrounding facts tend to reinforce that inference." Id.; See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).[30]

The Board, however, has held that some kinds of circumstantial evidence are more likely than others to satisfy the General Counsel's initial burden. In that connection, the Board stated:

> For example, evidence that an employer has stated it will fire anyone who engages in union activities, while undoubtedly 'general" in that it is not tied to any particular employee, may nevertheless be sufficient, under the circumstances of a particular case, to give rise to a reasonable inference that a causal relationship exists between the employee's protected activity and the employer's adverse action. In contract, other types of circumstantial evidence—for example, an isolated, one-on-one threat

[30] "The absence of any legitimate basis for action, of course, may form part of the proof of the General Counsel's case." *Wright Line*, 251 NLRB at 1088 fn. 12 (citing *Shattuck Denn Mining*, supra).

> or interrogation directed at someone other than the alleged discriminate and involving someone else's protected activity—may not be sufficient to give rise to such an inference. *Tschiggfrie Properties, Ltd*., supra at 8.

Thus, the Board has held that the General Counsel does not invariably sustain his burden by producing—in addition to evidence of the employee's protected activity and the employer's knowledge thereof—any evidence of the employer's animus or hostility toward union or other protected activity. The evidence must instead be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. Id.

Once the General Counsel makes such a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's adverse action, the burden then shifts to the employer to establish by a preponderance of the evidence that the same action would have taken place even in the absence of the employee's union or other protected concerted activity. *Tschiggfrie Properties, Ltd*., supra, slip op. at 1, fn. 3; *Strongsteel of Alabama*, supra, slip op. at 1; *Lucky Cab Co.*, 360 NLRB 271, 276 (2014); *Austal USA, LLC*, 356 NLRB 363, 364 (2010); See also *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961 (2004). This burden may not be satisfied by an employer's proffered reasons that are found to be pretextual, (i.e., false reasons or reasons not in fact relied upon for the adverse employment action). In addition, it is apparent that the employer does not sustain its burden by simply showing that a legitimate reason for the action existed. As the Board stated in *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984):

> We have held that the burden shifted to an employer under *Wright Line* is one of persuasion, an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. If an employer fails to satisfy its burden of persuasion, the General Counsel's prima facie case stands unrefuted and a violation of the Act may be found. See *Wright Line*, 251 NLRB at 1088 fn. 11; *Bronco Wine Co*., 256 NLRB 53 (1981); *Rikal West, Inc.*, 266 NLRB 551 (1983). Cf. *Magnesium Casting Co*., 259 NLRB 419 (1981).

Therefore, in rebutting the General Counsel's prima facie showing that the protected conduct was a "motivating factor" in the employer's decision, the employer cannot simply present a legitimate reason for its action but must persuade, by a preponderance of the evidence, that the same action would have taken place even in the absence of the protected conduct.

b. The General Counsel's prima facie case of discrimination

(1) The requirement that Ivan Thompson was engaged in union and concerted activity for the purpose of mutual aid or protection

The evidence in this case establishes that Ivan Thompson engaged in union activities when he made statements about local union members being discriminated based on their race and local union affiliation in the grievance investigation interview with Moncada on August 17, 2018. The grievance that Moncada had originally come to the jobsite to investigate and process for the

Respondent quickly morphed into something larger than the two employees who had the grievance filed on their behalf. In the act of investigating and processing the grievance, and after discussing the grievance with the union officials, the Respondent became aware that the Union's grievance was alleging discrimination based on race and local union affiliation. The grievance, as Chastka described, became more about a "global problem" of disparate treatment and more of a "[p]roblem of overall management and a feeling of our management discriminating based on local affiliation and race." (Tr. 351–354; 962–963.) In Thompson's interview, in which Local 894 representatives Orr and Floyd were present, he provided Moncada with his observations and assertions of conduct by Respondent's managers that he believed constituted racial discrimination, and thus he clearly provided information that was related to and concerned the nature of the Union's grievance alleging disparate treatment and discrimination based on local union affiliation and race.

Besides constituting union activity, Thompson was also engaged in protected concerted activity. It is well established that an employee's conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection" for it to be protected under Section 7 of the Act. *Eastex Inc. v. NLRB,* 437 U.S. 556, 565 (1978). The Supreme Court held that Congress did not intend to limit the protection of Section 7 of the Act to situations "in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984). The Court also held that "mutual aid or protection" concerns "the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" *Eastex, Inc.*, supra at 565. The concertedness and "mutual aid or protection" elements under Section 7 are therefore analyzed under an objective standard, and the subjective motive for the employee's action is not relevant to whether that action was concerted. "Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one." *Circle K Corp.,* 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993).

The Board defined concerted activity in *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), as activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The Board clarified that definition of concerted activity in *Meyers II*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), to include cases "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." Id. at 887.

In this case, Ivan Thompson and the other employees interviewed by Moncada, did not voluntarily seek her out to voice their personal complaints. Instead, they were summoned by the Respondent to provide information and convey their views concerning a grievance that morphed into claims of disparate treatment regarding all employees' working condition, in particular, disparate treatment or discrimination against employees based on race and their local union affiliation. In fact, Moncada, whose intent was to interview all of the Local 894 members who were on the jobsite that day, testified that in questioning those individuals, she was trying to find out whether allegations of "rampant discrimination" on the jobsite had merit, and she asked about the treatment of people and things people may have heard, witnessed, or observed. (Tr. 1193–1195.) She also testified that she inquired about "double standards in place" between Local 894

members and non-members, supervisors and employees, African-American employees and Caucasian employees, and African-American employees and Caucasian supervisors. (Tr. 1193–1194.) Moncada also informed those being interviewed that they were there to discuss "double standards" or "racial issues." (Tr. 442.)

By the very nature of the construct of the Respondent's grievance interviews, it is not surprising that Thompson's participation in the interview included some personal complaints of how he perceived he was treated by management. However, despite those personal complaints, his statements to Moncada also included his observations of Respondent's practices at the jobsite that affected all employees. His observations included identifying supervisors and managers whom he believed engaged in racially discriminatory conduct, including Superintendent Mike Quinn and Foreman Jack Harris. (Tr. 725–752.) Thompson's statements to Moncada concerned racial discrimination not just involving himself, but for all African-American employees at the jobsite. As such he conveyed his belief that blacks were generally precluded from working in the tunnel where the pay was higher than in the yard. His complaints to Moncada also included, inter alia, assertions of disparate treatment for employees regarding the use of safety equipment and infractions. It is clear from his comments to Moncada that he was attempting to bring to management's attention complaints regarding disparate treatment and racial discrimination that affected the working conditions of all employees.

Even though Thompson's comments to Moncada were expressed individually, the Board has found that such "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612, 613 (1980); see also *Alleluia Cushion Co.*, 221 NLRB 999, 1000 (1975). I find that Thompson's comments to Moncada were for the purpose of protecting and furthering employees' rights, and therefore under established Board law he was engaged in concerted activity. See *Chromalloy Gas Turbine Corp*., 331 NLRB 858, 863 (2000), enfd. 262 F.3d 184 (2d Cir. 2001)(concerted activity found where the discriminatee did not raise "purely personal concerns" but rather "espoused the cause of the hourly shop employees" and sought to have the new break policy applied "fair[ly] to all employees.").

Moreover, it is clear from the record that Moncada was conducting her employee interviews as part of her investigation to determine whether the complaints of "rampant discrimination" had merit, and if they did, it is plausible that Respondent's intent was to take some sort of action to remedy or resolve those issues if they existed. The evidence does not establish, nor is it plausible, that the Respondent was conducting its interviews to simply gather the complaints of its employees and then take no action if in fact such discrimination and double standards were discovered. The protected statements made by Thompson, if in fact they were to be believed by the Respondent, were such that they looked forward to action by the Respondent. As such, Thompson's protected statements constituted more than mere griping. See *Alstate Maintenance*, 367 NLRB No. 68, slip op. at 4 (2019)(where the Board has found that under *Meyers II*, "[w]here a statement looks forward to no action at all, it is more than likely mere griping.").

I further find that Thompson's conduct was for the purpose of mutual aid or protection. It is well established that the "mutual aid or protection" clause encompasses "much legitimate activity [by employees] that could improve their lot as employees." *Eastex*, 437 U.S. at 567. In this case, Thompson's participation in the interview with Moncada concerned complaints, not just

about his personal situation, but also about the treatment of employees in general, and such was in furtherance of the mutual aid or protection of other employees' rights to work in a safe and harassment free environment. Thompson's actions were an attempt to protect the rights of those employees, and therefore were actions related to improving the employees' conditions of employment. See *Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168, 172 at fn. 3 (3d Cir. 2004).

Moreover, Board precedent firmly establishes that employee complaints about supervisors' treatment of employees is directly related to working conditions and constitutes protected concerted activity. *Calvin D. Johnson Nursing Home*, 261 NLRB 289 fn. 2 (1982), enfd. 753 F.2d 1078 (7th Cir. 1985); *Astro Tool & Die Corp*., 320 NLRB 1157, 1162 (1996). In fact, the "[c]oncerted efforts by employees to alleviate racially discriminatory employment conditions have long been held protected activity. . . ." *Vought Corp.*, 273 NLRB 1290, 1294 (1984); See also *Honeywell, Inc.*, 250 NLRB 160, 161 (1980), enfd. 659 F.2d 1069 (3d Cir. 1981) (where the Board found that an employee's "naming supervisors and others as engaging in racial discrimination" constituted protected activity). In addition, in *Honeywell, Inc.*, supra, the Board also found that the employee's "criticism of Respondent's promotion policy as being racially discriminatory constitute[d] concerted activity protected under Sec. 7 [of the Act]." Id. at 161, fn. 6; see, e.g., *General Teamsters Local 528 (Theatres Service Co.)*, 237 NLRB 258 (1978).

(2) The requirement that the Respondent had knowledge of Thompson's union and protected concerted activities

In this case, the General Counsel has alleged that Ivan Thompson's statements made in his interview with Moncada on August 17, 2018 constituted his protected activity. However, the evidence establishes that Moncada, the Respondent's agent who had knowledge of Thompson's protected activity, played no role in the decision to lay him off. Conversely, the evidence establishes that Chastka, and to a certain extent Mike Quinn who made the recommendation to include Thompson in the reduction in force, were responsible for making the decision to lay off Thompson. There is no direct evidence, however, that the decisionmakers who selected Thompson for layoff had any knowledge of his protected statements to Moncada. In fact, it is undisputed that both Chastka and Quinn were not present at Thompson's interview, and they were not even in town at the time the protected statements were made in his interview. Thus, the question pertaining to this requirement of the General Counsel's prima facie case is whether Moncada's knowledge of Thompson's protected statements can be imputed to the decisionmakers or whether the evidence is sufficient to support a "reasonable inference" that Moncada communicated Thompson's protected statements to the decisionmakers prior to the decision to lay him off.

While it is well established that the Board will impute a manager's or supervisor's knowledge of an employee's protected concerted or union activities to the decisionmaker, it will not impute such knowledge if the employer affirmatively establishes a basis for negating such an imputation. *G4 Secure Solutions (USA) Inc*., 364 NLRB No. 92, slip op. at 3 (2016); See e.g. *Vision of Elk River, Inc.*, 359 NLRB 69, 72 (2012), reaffirmed and incorporated by reference in 361 NLRB 1397 (2014).

In this case, both Chastka and Quinn specifically testified without contradiction that they did not have knowledge of Thompson's protected statements made in his interview with Moncada. Chastka testified that Moncada never told him that Thompson interviewed with her; she never

conveyed Thompson's statements, protected or otherwise, to him; and she did not share her notes from Thompson's interview with him. Quinn also testified that although he knew that employees (including Ivan Thompson) were interviewed by Moncada, he was not present for the interviews, Moncada never conveyed the identity of the employees interviewed or the statements they made, he did not discuss those interviews with any of the laborers on the project, and he did not discuss the interviews with Chastka. Quinn also testified that his involvement with Moncada's investigation consisted only of being interviewed by her on the day Thompson was laid off, and that he specifically recalled that Moncada never asked him about or discussed Ivan Thompson in his telephone interview. (Tr. 1099.)

Moncada corroborated the testimonies of Chastka and Quinn by testifying, without contradiction, that she was never involved in the decision to lay off Thompson. She also testified that she never conveyed to either Chastka or Quinn that Thompson was one of the employees interviewed, she never conveyed to them the specific comments or statements made by Thompson, and she never shared with them her notes setting forth the details of Thompson's statements. While Moncada testified that she requested information from Chastka in order to fully investigate the allegations made by the employees interviewed that day, that was the extent of his involvement with her investigation. Quinn's only involvement with the investigation consisted of his being interviewed by Moncada on August 24, 2018, which was the same day that Thompson was laid off. Consistent with Quinn's testimony, Moncada testified that she never brought up or discussed Ivan Thompson in Quinn's telephone interview.

Even if the evidence established that Thompson's name was mentioned in his telephone interview with Moncada, that would be immaterial because there is absolutely no evidence to suggest or establish that Thompson's protected statements were in any way conveyed to Quinn. In addition, the General Counsel's assertion that Quinn was aware of Thompson's protected statements to Moncada is belied by the fact that Quinn's interview occurred after the decision to include Thompson in the layoff. As mentioned above, Quinn's interview with Moncada was by telephone, after she had left the jobsite and returned to California, and after Quinn returned from being on vacation during the week that Moncada was at the jobsite. Moncada testified that she spoke to Quinn by phone around mid-morning on August 24, and she stated that her notes supported her recollection because the notes ended the previous day on August 23, 2018, at 2:08 p.m., which would have been 5:08 p.m. in Ohio, which is after-hours Ohio time and she would not have spoken to Quinn that late in the evening. The documentary evidence also confirms that Moncada called Quinn on August 24, 2018, at 11:14 a.m. EST, and that the call was 58 minutes in duration. (R. Exh. 15.) With regard to the timing of the decision to layoff Thompson, the Respondent's timecard detail report shows that Thompson's hours worked for August 24, 2018, were not notated with the work he was scheduled to perform, but instead it was coded as "layoff," establishing that he was to be laid off that day. (Tr. 1301–1307; Jt. Exh. 3(a).). That marking was consistent with the Respondent's timecard status report, which shows the dates, times, and changes made to the timecards, and which shows that the August 24, 2018 entry establishes that the layoff was sent to payroll on August 24, 2018, at 9:21 a.m., which was approximately 2 hours before Moncada spoke to Quinn in his interview. Therefore, it is implausible that Quinn would have known of Thompson's protected statements prior to the decision to lay him off.

Thus, there is no direct evidence that the decisionmakers were aware of Thompson's protected statements prior to deciding to include him in the reduction in force layoff. Despite the

fact that the testimonies of Chastka, Quinn, and Moncada were unrebutted and there is no direct evidence that Thompson's protected interview statements were conveyed to the individuals who decided to lay him off, the General Counsel nevertheless argues that a "reasonable inference" should be drawn that Moncada shared the "investigation findings, including the incidents raised and the participants in the investigation directly with Chastka." (GC Br. 13–14.) The General Counsel specifically bases his assertion on the fact that: (1) Moncada, in an August 23 email to Orr, stated that "Dave [Chastka] and I have been working together investigating the complaints made by its union members;"[31] (2) Moncada, in that same August 23 email identified two employees (Wilks and Seese) as individuals who made complaints, which he alleges contradicts Chaska's testimony that Moncada did not disclose the identity of employees who were interviewed;[32] and (3) Moncada, in conducting her investigation, in an August 20 email requested information from Chastka pertaining to issues raised by the interviews, one of which concerned the "broom incident," which Ivan Thompson, among others, spoke about in his interview.[33]

I find no merit in the General Counsel's argument that the evidence cited above supports a sufficient basis for an inference that Respondent's decisionmakers possessed knowledge of Thompson's protected statements. In making this determination, I initially note that the testimonies of Moncada, Chastka, and Quinn, besides being unrebutted, were very credible. Credibility determinations may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001)(citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622; *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951).

The General Counsel, in asserting that Moncada and Chastka presented conflicting testimonies, asserts that they should not be believed. I find no merit to that assertion. I studied the demeanor of the witnesses very carefully at trial. My observation during the trial was that Moncada, Chastka, and Quinn all appeared sincere, honest, and unbiased in their demeanor. Their testimonies were also consistent, convincing, and straightforward. Moncada, in particular, struck me as someone who took the Union's complaints very seriously and seemed sincere in her testimony that she wanted to find out if there was merit to their allegations of discrimination and double standards. She likewise appeared honest in her testimony that she did not reveal Ivan Thompson's protected statements to the decisionmakers, or that she showed them her notes from the interviews. In addition, Chastka struck me as someone who had very good recall of the facts of this case, and someone who was very honest in his testimony that, even though he assisted Moncada in the investigation by providing her the information she needed, he was never provided the protected statements that Thompson made in his interview and he never took into consideration Thompson's statements when deciding to include him in the layoff.

[31] (GC Exh. 7)
[32] (GC Exh. 10)
[33] Id.

In addition to finding the Respondent's decisionmakers credible, I find no merit in the General Counsel's argument that an inference of knowledge should be drawn. With regard to the General Counsel's first argument that Moncada told the Union officials that Chastka was working with her to investigate the complaints, I note that Chastka never disputed working with Moncada on her investigation. In fact, the record establishes that Chastka had, in fact, worked with Moncada on the investigation to the extent that he provided her with information and documents that she requested to adequately investigate the issues raised in the interviews. The record, however, is devoid of any evidence that he did anything more than supply the information requested. In addition, the fact that he supplied her with the information she requested and that she informed Orr that she was working with Chastka on the investigation does not mean that Moncada shared with him that Ivan Thompson was one of the individuals who brought those concerns to her attention, nor does it mean that she shared the details or specific protected statements that Thompson made in his interview.

I also find the General Counsel's second argument that Moncada identified two employees who made complaints, and that such testimony somehow conflicted with or contradicted Chaska's testimony, is likewise insufficient to warrant drawing an inference. In fact, that assertion is immaterial to the issues in this case. The only relevant evidence would have been whether she disclosed Thompson's identity and the specific allegations and statements that he made to her which constituted his union and protected concerted activity.[34] The fact that Moncada may have identified two other employees does not diminish Chastka's credible testimony that Moncada never talked to him about Thompson, nor did she ever identify him or provide his protected statements. Moreover, with regard to the General Counsel's third argument, I find that Moncada's request for information from Chastka pertaining to the "broom incident," is similarly insufficient to warrant drawing any inferences because she never identified Ivan Thompson as the person who brought the broom incident to her attention, the broom incident was well known on the jobsite by many employees and managers, and, most importantly, the broom incident was specifically brought up by others in their interviews, including Monty Thompson.

Thus, I find that the evidence does not establish that the decisionmakers knew of the specific statements Thompson made in is interview which constituted his protected concerted and union activities. The Board has held that "[i]n an 8(a)(1) discharge or layoff case, the issue is whether the decisionmaker knew of the concerted protected activity, not whether the decisionmaker should or reasonably could have known." *Reynolds Electric, Inc.*, 342 NLRB 156, 157 (2004). The evidence in the instant case is too speculative and it is insufficient to warrant a

[34] In finding immaterial the question whether Chastka and Quinn knew that Ivan Thompson was one of the employees interviewed by Moncada, I note that based on Moncada's stated intent to interview all Local 894 members that were at work on August 17, 2018, it is no surprise that Chastka and Quinn would have believed that Ivan Thompson was one of those members, and in fact, Quinn testified that he was aware that Thompson was interviewed by Moncada. (Tr. 1084.) The fact that they were aware or should have been aware that Thompson was interviewed (along with all the other Local 894 members that day) does not equate to an inference that Moncada disclosed to them Thompson's specific protected statements or comments. I likewise find no merit to the assertion that Moncada's identification of two employees who made complaints somehow contradicted Chaska's testimony or that it lessened his credibility in any way. As explained above, Chastka was a very credible witness, and I find that such a statement, if contradictory, was simply an honest misstatement or oversight by him.

reasonable inference that the decisionmakers had knowledge of Thompson's protected concerted and union activities. Likewise, I find that the Respondent has affirmatively established a basis for negating any imputation of knowledge from Moncada to Chastka or Quinn, the individuals who made the decision to include Thompson in the reduction in force layoff. The evidence is therefore insufficient to find that the knowledge element of the General Counsel's prima facie case has been established here.

(3) The requirement of the Respondent's animus against Thompson's protected activity

As mentioned above, under *Wright Line*, the General Counsel must initially show that Thompson's protected concerted and union activities were a substantial or motivating factor in Respondent's decision to lay him off or discharge him. *Tschiggfrie Properties, LTD*, 368 NLRB No. 120, slip op. at 3 (2019), citing *Tschiggfrie Properties, Ltd. v. NLRB,* 896 F.3d 880, 885 (8th Cir. 2018). "Motivation is a question of fact that may be inferred from both direct and circumstantial evidence." *Tschiggfrie Properties, LTD*, supra, slip op. at 3, citing *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013)(internal quotations omitted); See *Webco Industries*, 334 NLRB 608, 608 fn. 3 (2001)(Under *Wright Line*, the General Counsel "must establish that the employee's protected conduct was, *in fact*, a motivating factor in the Respondent's decision); See, e.g., *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To meet the General Counsel's initial burden, "the evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." *Tschiggfrie Properties, LTD*, supra, slip op. at 1. Thus, the General Counsel must establish "a connection or nexus" between the Respondent's animus towards Thompson's protected statements and his layoff/discharge. Id. slip op. at 3.

As mentioned above, "[p]roof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole." Id. slip op. at 8; *Embassy Vacation Resorts*, supra at 848. Since *Wright Line* is inherently a causation test, the Board has held that "the General Counsel does not *invariably* sustain his burden by producing—in addition to evidence of the employee's protected activity and the employer's knowledge thereof—*any* evidence of the employer's animus or hostility toward union or other protected activity." Id. slip op. at 8. The evidence instead must be sufficient to establish that a causal relationship exists between the protected activity of that employee and the employer's adverse action against that employee. Id.

In this case, while the General Counsel has provided evidence that Thompson was engaged in protected activities, the evidence does not establish that Respondent's decisionmakers had knowledge of those protected activities, and General Counsel has therefore failed to sustain his burden of proving a prima facie case of discrimination. However, even assuming arguendo that the General Counsel did sustain his burden of proving knowledge, and the analysis turned to the question of whether the General Counsel has established that the adverse employment action was unlawfully motivated, I find that the evidence is insufficient to establish discriminatory motive or animus by the Respondent.

In this case, there is no direct evidence of any animus by the Respondent towards Thompson's participation in its investigation of the Union's allegations of discrimination and

double standards towards employees based on their race or union affiliation, nor is there direct evidence of animus towards Thompson's statements made in the interview with Moncada that constituted his union and protected concerted activities. Nevertheless, the General Counsel submits that circumstantial evidence infers discriminatory motive or animus demonstrated by the fact that: (1) the timing of Thompson's layoff was in close proximity to his protected activities; (2) the Respondent allegedly departed from past practice in the way it conducted the August 24, 2018 layoffs; and (3) the Respondent's proffered explanation for the adverse action was allegedly pretext; (GC Br. p. 14–15.)

(i) The alleged suspect timing of Thompson's layoff

It is well-established that the timing of an employer's adverse action could constitute circumstantial evidence of unlawful motivation. *Success Village Apartments*, 348 NLRB 579, 579 fn. 5 (2006). In this case, the General Counsel argues that Thompson's layoff 7 days after his interview with Respondent's grievance investigation supports an inference that his layoff was discriminatorily motivated. (GC Br. p. 15–16.) While the Respondent's implementation of its reduction in force just one week after Thompson's protected activities could weigh in favor of an inference of unlawful motivation, the evidence does not support that such timing was in any way suspect. As set forth in the discussion below, regardless of the close timing, the evidence does not establish a causal relationship between Thompson's protected conduct and his inclusion in the reduction in force.

(ii) The alleged departure from past practice

The Board has held that an employer's deviation from past practice may be considered evidence of animus. *Allstate Power Vac, Inc.*, 354 NLRB 980 (2009). The General Counsel alleges that evidence of animus can be found in Thompson's layoff on August 24, 2018, because the Respondent "failed to give the Union or Thompson any written notification of an impending layoff," and by doing so it deviated from its earlier layoff of employees in December 2017, when it provided the Union with prior written notice of those to be laid off and their subsequent recall dates. (GC Br. 16.)

This argument is not supported by the record and it fails for several reasons. Initially, it is important to note that the layoff in December 2017, where Thompson was one of the employees laid off for approximately 3 weeks, is distinguishable from the reduction in force layoff on August 24, 2018. The record shows that the layoff in 2017 was due to the fact that the TBM machine stopped working and work for the employees was expected to cease for only a limited period of time. As such, the Respondent fully expected that the employees would be recalled as soon as the machine was working again, and it provided written notice of that layoff and the recall dates for employees. Conversely, the layoff in August 2018 was due to a reduction in force based on the fact that certain aspects of the job were coming to completion and some employees needed to be released from work with no expectation of recall. In addition, even though there is no contractual requirement that the Union be provided with written notice of pending layoffs, the Respondent nevertheless provided the Union with advance notice of the August 24, 2018 reduction in force layoff, and it even provided the Union with the identities of those who were subject to the layoff. In this connection, on August 7, 2018, Chastka informed Orr by email that they "should discuss the upcoming layoffs associated with the tunnel work coming to an end…," and on or about August

20, Chastka presented Floyd with a list of the employees who were going to be laid off. (GC Exh. 18; Tr. 103, 934, 1155–1156.) Thus, consistent with past practice, the Respondent provided the Union with advance written notice of the August 24, 2018 layoff, it explained the reason for the layoff, and it provided the Union with the names of the employees that were expected to be laid off.

(iii) The alleged inference that Respondent's proferred reason for Thompson's layoff/discharge was pretextual

As mentioned above, the Board held in *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019), that the Board may infer from the pretextual nature of an employer's proffered justification for an adverse action that the employer acted out of union animus, "at least where . . . the surrounding facts tend to reinforce that inference." Citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d at 470 (emphasis added).

The General Counsel submits that it can be inferred that Respondent's explanation for Thompson's layoff was pretextual and that Chastka's and Quinn's explanation that Thompson was laid off because a significant part of the work was coming to completion, was actually a ruse based on the facts that: (1) there was still yard work left to be completed; (2) Thompson was a qualified and knowledgeable yard crew worker who should have been retained; (3) some yard work remained on the jobsite for several months after Thompson was laid off, which he could have performed; (4) about a month prior to Thompson's layoff for lack of work, the Respondent hired additional yard crew workers; and (5) Thompson should have been retained over yard crew employee Mark Strong, who was not laid off.

In considering and analyzing the General Counsel's arguments, I initially find it important to note that as articulated above, both Chastka and Quinn were very credible witnesses and their demeanors were honest and truthful. Their testimonies were unrebutted and they testified in a consistent and convincing manner. I therefore find that the reasons they articulated for including Thompson in the reduction in force were credible and believable. In addition, for the reasons set forth below, I further find that their explanations for including Thompson in the reduction in force were plausible and supported by the record evidence.

In regard to the assertion that there was still yard work left to be completed when Thompson was laid off, I find that the General Counsel's reliance on that fact is misplaced. It is undisputed that there was in fact some yard work left to be completed after Thompson's layoff. However, the reason set forth by the Respondent was not that all yard work was completed, but instead that some of the primary work which Thompson was performing was coming to completion. In that connection, the record showed that the tunnel was nearing completion, and the concrete segment delivery work in the yard, much of which was being performed by Thompson, was likewise coming to completion. The record shows that Thompson was involved in handling the delivery of the segments, and Monty Thompson testified that Ivan Thompson was the employee who had been primarily performing segment work for the preceding several months. In addition, Monty Thompson testified that he, Ivan Thompson, and Mark Seese were the only yard crew employees trained on completing the segment delivery paperwork, and that when Monty sustained an injury in early August 2018, Ivan Thompson took over the duties associated with handling the segment

work. Thus, it is believable and plausible that when the segment work was coming to an end, Ivan Thompson would have been one of the employees selected for the reduction in force.

In support of his argument of pretext, the General Counsel also contends that it can be inferred that Thompson was laid off for his protected activities because he was a qualified and knowledgeable yard crew worker who should have been retained. In making this argument, the General Counsel specifically relies on Foreman Mark Seese's assertion that Thompson was the "most knowledgeable" yard crew worker. The General Counsel's reliance on Seese's opinion, however, is misplaced and does not support an inference of pretext. Initially, I note that Seese based his opinion that Thompson was the "most qualified" yard worker on the fact that he allegedly "had a general knowledge of where everything [was] in the [conex boxes]" and he was "very organized and clean." (Tr. 245–246.) Despite Seese' opinion, there is no credible evidence that Ivan Thompson was the only Yard Crew employee who knew where items were located in the Conex Boxes or that he was the only employee who was organized and clean.[35] There is likewise no evidence that the other yard crew employees were incapable of performing their job functions because they somehow did not know where items were located, or because they were disorganized or unclean. In addition, the record did not establish that Seese was one of the individuals who determined which employees should be laid off in a reduction in force situation, nor did it establish that the Respondent relied upon his recommendation regarding layoffs. Instead, the record clearly established that Chastka was the manager responsible for determining reduction in force layoffs, and that he considered the recommendations of his general superintendent, Mike Quinn. Thus, while Seese's opinion may have been relevant, it was in no way determinative on the issue of which employees should or should not be included in a reduction in force.[36]

Moreover, the Respondent never disputed the fact that Thompson was a good worker and that he was qualified to perform yard work. However, even assuming that Thompson was one of the most qualified yard workers, the record does not establish that the best workers were immune from being chosen for layoff in reduction in force situations. In fact, as Chastka credibly testified, "sometimes [you have to choose] between two good people." (Tr. 1141.) Furthermore, as mentioned above, Chastka's testimony pertaining to the reason Thompson was chosen for the reduction in force was plausible and supported by the record because the last delivery date for

[35] I find that Seese's general assertion at trial that no other laborers knew where items were located in the Conex Boxes and that "[n]obody else knew where the stuff was . . .," was an exaggeration and simply not credible, believable or plausible. Therefore, I provide that testimony little, if any, weight. (Tr. 246.)

[36] The General Counsel did not allege, either in the Complaint, the Amendment to Complaint, or at trial, that Mark Seese was a supervisor or agent of the Respondent within the meaning of Sec. 2(11) and (13) of the Act, respectively. Nevertheless, in its post-hearing brief, he "urges the [Administrative Law Judge] to find that at all material times, Respondent's foreman, Mark Seese, was a supervisor of Respondent within the meaning . . . of the Act." (GC Br. p.18, fn. 3.) To the extent that the General Counsel's "urging" can be interpreted as a post-hearing motion to amend the complaint, I find that such a determination is unwarranted and not supported by the record. The General Counsel had ample opportunity, both before and during the trial, to make a motion to amend the complaint to include that allegation, or to even seek to have the parties stipulate to that fact, but it failed to take either of those actions. Thus, the Respondent was never aware that Seese's supervisory status was at issue, and, importantly, the matter was never litigated. For the General Counsel to now seek that determination, where the Respondent was never put on notice or provided an opportunity to present evidence on that allegation, such a request is unwarranted and is therefore denied.

segments at the jobsite was August 22, 2018, and a substantial amount of work that the yard crew, and in particular Ivan Thompson, played a substantial role in, was winding down and soon to be completed. (Tr. 1132–1133; 1139; 1322.) Thus, Chastka's reasons for including Thompson as one of the employees for layoff was consistent with the undisputed evidence.

The General Counsel also argues that since some yard work remained for several months after Thompson's layoff, that supports an inference that the reduction in force, and the reason for including Thompson in it, were pretext. (GC Br. p. 19.) This argument is unpersuasive and baseless. In support of this assertion, the General Counsel relies on Seese's testimony that some of the managers, including Chastka and Quinn, told him early on in the project that it was expected that the yard crew would remain on the job after the tunneling work was completed. However, Seese's testimony about how long he would remain on the project and how much work would be left to perform is simply immaterial to Thompson's layoff. Seese testified that when he inquired about how long the project would conceivably last, he was inquiring in the context of his wanting to move to the Respondent's next project to work as a foreman or as a tunnel boring machine operator. (Tr. 218.) It was not in the context of inquiring about how long Ivan Thompson would be working on the project. In addition, the record does not establish that Seese ever asked how long everyone on the yard crew would be expected to work on the project, or how long Ivan Thompson would be guaranteed to work on the project. In fact, there is no evidence that Respondent made any guarantees or assurances to Seese or any other employees about the duration of the project. To the contrary, the General Counsel actually presented evidence that directly contradicted its assertion or suggestion that the Respondent gave assurances that Thompson was to avoid layoff and stay on the project to the very end. In regard to the expected duration of Ivan Thompson's work on the project, Seese specifically testified that between the time shortly after he became a foreman in November 2017 and the time of the "broom incident," which occurred in or before June 2018, Mike Quinn told him "multiple times" that Ivan Thompson would be one of the first employees removed from the jobsite. (Tr. 290–291.)

In addition, the General Counsel argues that pretext can be inferred based on the fact that in July 2018, about a month prior to Thompson's layoff for an asserted lack of work, the Respondent hired some additional yard crew workers. (GC Br. p. 19–20.) While the record did show that the Respondent hired some laborers up to August 9, 2018, to perform work on the project, it also established that Chastka provided a credible and plausible explanation for the hiring of those employees that shows it was unrelated to Thompson's layoff. As mentioned above, when questioned as to why Respondent would hire laborers as late as August 9, 2018 to work on the project, Chastka testified that auxiliary work needed to be performed at the retrieval shaft where the TBM was going to complete the tunnel and be removed from the jobsite. He credibly explained that other laborers were hired to complete that work since the remaining laborers on the project were working in other areas on other tasks. (Tr. 98–99; GC Exh. 32 (a) and (b).) Chastka also credibly testified that "it was a timing issue" because "the Yard crew still had to perform their work while the mining was happening," and the Respondent needed the newly hired laborers to "prep for the mining machine to be able to come through the shaft wall, build a cradle, a surface to be able to pull the machine out and rip it apart." (Tr. 1157–1158.) Thus, this argument also lacks merit.

Finally, the General Counsel bases his argument of pretext on the fact that yard crew employee Mark Strong was retained while Thompson was laid off. (GC Br. p. 20–22.) In making

this argument, the General Counsel submits that Chastka was "unable to provide any logical explanation that Strong had increased abilities or was a better at [sic] team worker than Thompson." (GC Br. p. 22.) Contrary to the General Counsel's assertions however, the record does not support that argument. It is true that after the August 24, 2018 reduction in force, Mark Strong, Mia Turner, and Monty Thompson remained on the yard crew. (Tr. 1157.) However, with regard to the reason Mark Strong was not chosen for layoff and Ivan Thompson was, Chastka credibly explained that at the time of layoff he had knowledge of Strong's work ability and had interacted with him for about a year, which included having conversations with him at the morning Take 5 meetings. (Tr. 929.) Chastka also testified that he believed that Strong was better in "ability and teamwork" than Thompson at the time of the layoff, and that included Strong being more of a "self starter, having more knowledge, and communicating better with supervision." (Tr. 930–933.)

Based on the above, I find that while Ivan Thompson was engaged in union and protected concerted activities in his interview with Moncada, the General Counsel failed to establish beyond a preponderance of the evidence that those protected activities were a motivating factor in his layoff/termination. The evidence failed to establish that the Respondent's decisionmakers had knowledge of Thompson's protected statements and activities at the time they decided to lay him off, and the record is devoid of any evidence that the Respondent harbored animus toward Thompson's protected activities. Critically, the evidence is speculative at best, and insufficient to support any reasonable inference of unlawful motivation or animus by the Respondent. That includes the fact that there is no evidence, either direct or circumstantial, that Respondent departed from past practice in instituting its reduction in force layoff. Furthermore, under the circumstances of this case, the evidence does not support an inference that Respondent's proffered reasons for including Thompson in the reduction in force were pretext for unlawful motivation, or that there was a causal relationship between the Thompson's union or protected concerted activity and the Respondent's adverse employment action. See, *Tschiggfrie Properties, Ltd.*, supra slip op. at 1 and 8.

Even assuming, however, that the Respondent's asserted reasons in this case were found to be pretextual, the Board has held that such evidence would be insufficient to warrant an inference that the decision to lay Thompson off was motivated by his protected activities. In *Electrolux Home Products*, supra, the Board found that an employer's proffered justification for discharging an employee (instead of imposing lesser discipline) was pretextual based on disparate treatment. Id. In that case, employee Mason participated in the union bargaining team or committee, and she was told by a supervisor to "shut up" when she spoke up in a captive-audience meeting held by the employer. The Board found, however, that on the record as a whole, it could not find that the disparity in disciplinary treatment warranted an inference that the discharge was motivated by Mason's union activities. Id. slip op. at 4–5. In making that finding, the Board noted that the General Counsel, who bore the burden of proving unlawful motivation, had not shown that the employer committed any contemporaneous unfair labor practices, and that there was nothing suspicious about the employer's investigation into Mason's failure to perform certain work that was requested. Id. slip op. at 4. The Board further explained that the interaction between Mason and her supervisor in a group meeting where he told her to "shut up," was an attempt to limit its captive-audience meeting to the expression of its own views, and although rude, it did not by itself, or in conjunction with the evidence of disparate treatment, establish that the employer harbored union animus. Id. In addition, the Board reasoned that the record did not contain any animus against collective bargaining or toward Mason and others on the bargaining team. Id. In that

connection, the Board specifically noted that when Mason was discharged, the employer and union had been bargaining in good faith and the record did not contain any instances of animosity during that bargaining, nor did it suggest any reason why the employer "would have singled Mason out from the group of employees who served on the bargaining committee." Id. slip op. at 4. Under the circumstances of that case, the Board did not find that disparity in disciplinary treatment warranted an inference that the discharge was motivated by Mason's union activities, and as such, the General Counsel failed to satisfy his burden of proving that Mason's union activity was a motivating factor in her discharge. Id. slip op. at 4–-5.

In applying some of the above factors to the instant case, I note that there is no evidence that the Respondent has committed contemporaneous unfair labor practices or that it harbored animus toward Thompson or any other employees who participated in its grievance investigation by way of interviewing with Moncada. In addition, at the time of Thompson's layoff, the Respondent maintained an ongoing relationship with the Union since the beginning of the OCIT project in 2015. The record also shows that the Respondent had good communications with the Union, which included advance notice and discussions about layoffs in both the December 2017 and August 24, 2018 layoffs. Like the employer's bargaining relationship with the union in *Electrolux Home Products, Inc.*, the record in the instant case is devoid of any evidence that the Respondent harbored animosity or hostility toward the Union over the course of the project or toward employees who participated in the grievance investigation by providing interviews to Moncada.

Moreover, similar to the Board's determination in *Electrolux Home Products* that Mason was not singled out from the bargaining team as someone who should receive disparate treatment for her engagement in that protected union activity, there is insufficient evidence in the instant case to suggest that Respondent singled out Thompson from the employees who participated in the investigatory interviews or who specifically registered complaints about working conditions or made negative statements about the conduct of Respondent's managers on the OCIT project. In fact, the record establishes that several Local 894 members who were interviewed by Moncada and made specific complaints about their working conditions and the way they were treated by Respondent's management personnel, were not laid off or terminated. For example: (1) Greg Dougherty discussed double standards with regard to employees he saw smoking in the tunnel; (2) Mark Strong stated that he thought there were issues with nepotism, he "felt that there was a culture of fear on the jobsite," and that he had a safety incident shortly after he started working there that he was afraid to report; (3) Mia Turner stated that working for the Respondent was "horrible," she was "uncomfortable being there," she believed there was prejudice at the jobsite, race issues, "clickishness," favoritism, fear of retaliation, and she did not trust her supervisor, Jack Harris; (4) Joe Minor stated that only a few African-Americans worked in the tunnel or remained in the tunnel once they were assigned to the tunnel crew; and (5) Monty Thompson told Moncada about numerous workplace concerns, including the "broom incident." (Tr. 1197–1206.) Despite registering similar complaints about working conditions and Respondent's managers/supervisors, none of those employees were included in the August 24 reduction in force or were terminated.[37]

[37] I also find it important to note that the General Counsel's assertion that it should be inferred that Thompson was singled out for his protected statements in his interview is belied by the fact that Local 894 member and yard crew employee Patricia Wheeler was also laid off on August 24, 2018, as part of the reduction in force, and she was neither interviewed by Moncada or a participant in the Respondent's

See *Electrolux Home Products*, supra, slip op. at 4–5; *Alexandria NE LLC*, 342 NLRB 217, 221–222 (2004) (finding punishment for first-time offense harsh but failing to find a violation based on the absence of evidence in the record to infer that the discharge was causally related to union animus); See also *New Otani Hotel & Garden*, 325 NLRB 928, 928 fn. 2 (1998) (finding that the record as a whole did not warrant an inference of antiunion motivation for discharges despite some evidence of disparate treatment).

c. Even assuming the General Counsel made a prima facie case of discrimination, the Respondent demonstrated that the same action would have taken place even in the absence of the protected activity

Once it is determined that the General Counsel failed to carry his burden of proving a prima facie case of discrimination, no further analysis is required. However, even assuming for the sake of argument that the General Counsel demonstrated that Thompson's protected activity was a motivating factor in the decision to lay him off, the Respondent has established, by a preponderance of the evidence, that the same action would have taken place even in the absence of the protected activity.

The evidence in this case does not establish that the Respondent instituted a reduction in force in order to terminate Thompson for his protected activities, nor does it show that he was included in that layoff because of those activities. Instead, the credible record evidence establishes that the reduction in force was planned and discussed with the Union prior to Thompson's exercise of protected activities in his interview on August 17, 2018. There is also no evidence, either direct or circumstantial, that Respondent departed from past practice in instituting its reduction in force. As mentioned above, the credible evidence provides that the Respondent had discussions regarding the reduction in force well in advance of Thompson's exercise of protected activities in his interview. Also, well in advance of Thompson's protected activities, and even before Moncada was contacted about the Union's grievance, Chastka informed the Union by email that they "should discuss the upcoming layoffs associated with the tunnel work coming to an end…."

The Respondent also demonstrated that the reduction in force, and the inclusion of Thompson in that layoff, were justified for reasons unrelated to Thompson's exercise of his protected activities. The evidence established that Ivan Thompson was involved in performing a substantial part of the segment work and the paperwork involved with receiving the segments. When Monty Thompson was injured in early August, Ivan Thompson took over his duties handling and receiving the segments. The evidence also established, as Chastka and Quinn credibly testified, that such yard crew work that Thompson played a substantial role in performing, was expected to be reduced as the tunnel neared completion, and in fact, several days before the reduction in force was implemented the last concrete segments were delivered to the jobsite. In addition, the TBM broke through and completed the tunnel at the retrieval shaft shortly thereafter, at the end of August 2018. Consistent with the undisputed fact that the tunnel construction was nearing completion, the Respondent continued to reduce its work force after Thompson's layoff, and over the next several months the work force was reduced from nearly 60 employees prior to August 2018 to approximately 11 union employees at the time of the hearing in this matter. Finally, from August 24 to November 30, 2018, additional reductions to the work force occurred

investigation.

with other employees being laid off or terminated, including several of whom participated in Moncada's investigation and interviews on August 17, 2018. Thus, the credible evidence establishes that the Respondent would have included Ivan Thompson in the reduction in force even if he had not engaged in protected activities in his interview with Moncada on August 17, 2018. Accordingly, the evidence does not establish that the Respondent's layoff and/or termination of Ivan Thompson violated Section 8(a)(3) and (1) of the Act, as alleged.

CONCLUSION OF LAW

The General Counsel has failed to prove by a preponderance of the evidence that Respondent violated Section 8(a)(3) and (1) of the Act by laying off and/or terminating employee Ivan Thompson.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[38]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. March 12, 2020

Thomas M. Randazzo
U.S. Administrative Law Judge

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.